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NONMARKET ECONOMY IMPORTS LEGISLATION

HEARING

BEFORE THE

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OF THE

COMMITTEE ON FINANCE

UNITED STATES SENATE

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NONMARKET ECONOMY IMPORTS LEGISLATION

MONDAY, MAY 7, 1984

U.S. SENATE,
COMMITTEE ON FINANCE,
SUBCOMMITTEE ON INTERNATIONAL TRADE
Washington, DC.

The committee met, pursuant to notice, at 2:35 p.m., in room SD-215, Dirksen Senate Office Building, the Honorable John C. Danforth (chairman) presiding.

Present: Senators Danforth, Heinz, and Mitchell.

[The press release announcing the hearing, background information on the subject, and the prepared statements of Senators Dole and Heinz follow:]

[Press Release No. 84-137]

SUBCOMMITTEE ON INTERNATIONAL TRADE SETS HEARING ON NONMARKET ECONOMY IMPORTS LEGISLATION

Senator John C. Danforth (R., Mo.), Chairman of the Subcommittee on International Trade, announced today that the Subcommittee would hold a hearing on Monday, May 7, 1984, on S. 1351, a bill to provide a special remedy for the artificial pricing of imports produced by nonmarket economy countries.

The hearing will commence at 2:30 p.m. in Room SD-215 of the Dirksen Senate Office Building.

In general, S. 1351 would create a new standard by which to determine whether articles imported from nonmarket economy countries are unfairly priced and, if found to injure materially or to threaten material injury to a U.S. industry, are therefore subject to penalty duties offsetting the margin of unfair pricing. The new "artificial price" standard would substitute in certain circumstances for the current calculation of antidumping and countervailing duties. When applicable, artificial pricing duties would be assessed in an amount equal to the difference between the "minimum allowable import price" and the actual import price of articles subject to the investigation. The "minimum allowable import price" would be the lesser of the lowest average, arms-length U.S. prices of either a comparable U.S. producer or other exporter to the U.S. market.

Senator Danforth requests that in oral or written testimony to the Subcommittee witnesses address certain particular subjects in addition to other issues raised by S. 1351. These subjects are:

1. Whether current unfair trade and "safeguard" relief laws are adequate with regard to nonmarket economy imports; and
2. Recent Department of Commerce and International Trade Commission determinations with regard to such imports.

STATEMENT OF SENATOR DOLE

Mr. Chairman: I welcome our witnesses today who will discuss a particularly difficult—and increasingly important—trade issue: unfair pricing of imports from nonmarket economy countries. I share your interest in seeking ways to streamline and to make less expensive the avenues for relief provided in U.S. laws for industries competing with unfairly traded goods. Nonmarket economy trade is an important place to start on the path of reform, and S. 1351 presents well some of the trade-offs required by attempts to streamline our laws.

For example, the essence of S. 1351 is the creation of a "minimum allowable import price" by which to judge the fairness of nonmarket economy imports. On the one hand, this standard is attractive in its certainty and relative simplicity. On the other, at some level it would clearly preclude price competition—the heart of our capitalist system. I will review carefully the pros and cons of this approach—and the potential precedent it would set for other areas of our trade laws—as the committee proceeds to consider this bill.

President Reagan's recent trip to China opened more doors to U.S. exports. The commercial opportunities in China, the Soviet Union, and elsewhere are great, and I believe trade is an important tool for increasing overall stability in our relations with these countries. But increasing imports from them is the other side of the coin, and U.S. producers are rightfully concerned about the terms under which they must compete with planned economies. Thus, I hope the hearing today will provide some insight into how best to meld our sometimes conflicting goals in this area of trade.

OPENING STATEMENT OF SENATOR JOHN HEINZ

This hearing is particularly timely due to the growing complexity of our trade relations with socialist nations. Increased trade has produced more unfair trade practice cases involving nonmarket economies and consequently more dissatisfaction with present law, based largely on one fundamental deficiency—the concept of dumping—sales at less than fair value—is inherently a free-market concept. It is useful only to the extent that costs and prices in an economy are real, so that a fair value can be determined. With rare exceptions, these conditions do not exist in a non-market economy, and our law has become seriously contorted in an effort to deal logically with this fundamental inconsistency. This problem has been further compounded in the last 6 months by the growing number of subsidy cases filed against non-market economies.

Since 1978, U.S. administrative regulations have attempted to cope with these problems through the use of the comparable economy concept, which I will not take the time to describe.

This approach, however, is flawed in its two basic assumptions that a simple and accurate basis exists for determining when economies are at comparable stages of development, and that comparable overall levels of development—assuming such can be determined—mean comparable levels within a particular industry. For example, when a country has targeted a particular industry for rapid development in order to stimulate its export sector, the level of development in that industry is likely to be greater than the economy as a whole, thus making industry specific comparisons based on aggregate national analyses, such as those performed under current law, highly misleading.

S. 1351 and its predecessor in the last Congress, S. 958, sought to deal with this problem by creating a new system based on the principles of treating nonmarket economies as much like Western economies as possible and of providing fairer and more certain means of determining whether an unfair practice has occurred.

In S. 1351, an interested party would file a complaint against a nonmarket economy alleging artificial pricing. Procedures and time limits for the ensuring investigation are in the same as in a countervailing duty investigation.

During the course of the investigation, the Commerce Department would consult with the nonmarket economy's government and solicit from it information that would enable the Department to determine dumping or the presence of a subsidy subject to the standards of current law for free-market economies.

If, in the Department's judgment, sufficient, verifiable information is provided to permit the case to be treated as a normal antidumping or countervailing duty case, then the Department would do so, moving the investigation to the appropriate law at the same point in time, and applying existing standards.

In those cases where the nonmarket economy will not or cannot provide the necessary information, a different standard would be employed. It would define artificial pricing as sales below the price of the lowest average price free-market producer. Even in this case, however, the petition would be treated pursuant to the time frames and procedures applicable to countervailing duty investigations in existing law.

I have tried to create with this legislation a carrot and stick mechanism that will encourage nonmarket economies to cooperate with our government in investigating the allegations in petitions filed against them and to adjust their economies in a way that will permit such cooperation to take place. Every opportunity is presented to treat these countries precisely as all other nations are treated under our laws, even to the extension of the injury test in appropriate circumstances. This represents a normalization of present law; while at the same time the alternative "lowest average price free-market producer" test provides a certainty and administrative ease of determination absent in present regulations.

The bill was not enacted in the last Congress, despite Administrative support for it, due to a controversy over the "lowest average price" standard. Some private sector groups preferred a higher standard, alleging that the language in the bill would effectively permit sales at less than fair value. Time and the Congress ran out before we could resolve that problem. However, I remain confident that we will resolve it, and I expect the Commerce Department testimony today to provide some useful new information. Our trading problems with nonmarket economies will only grow in the next decade, and we need to make sure that our laws are fully equipped to deal with those problems.

Senator DANFORTH. This is a hearing on nonmarket economy imports legislation.

Senator Heinz, do you have a statement?

Senator HEINZ. Mr. Chairman, I have a statement, but I would ask unanimous consent that the full text of my statement be placed in the record at this point.

I just want to say that I appreciate your having a hearing on S. 1351, which had as its predecessor in the last Congress my previous bill, S. 958, to which it is similar in many respects.

In my opening statement I detail some of the problems with present law, the reasons that we have written S. 1351 the way we have, and rather than take the time of the committee to highlight even the most salient points of my testimony, I think we might be well served to proceed.

Senator DANFORTH. All right, thank you very much. The statement will be included in the record.

The first witness is Lionel Olmer, Under Secretary of Commerce for International Trade.

STATEMENT OF HON. LIONEL H. OLMER, UNDER SECRETARY OF COMMERCE FOR INTERNATIONAL TRADE

Secretary OLMER. Thank you, Mr. Chairman.

I have a prepared statement which I would like to introduce into the record, and I would like to make only a few brief remarks before making myself available for your questions.

Mr. Chairman, we need S. 1351 enacted into law, and we need it now. We are not presently able to give our businessmen a fair shake in dealing with unfair trade practices of nonmarket economies. Not the best intentions in the world, not the best trained people in the world, not the hardest effort in the world can do it under current law.

I have testified at least twice on this subject before this committee, and I have expressed views informally to Senator Heinz on several other occasions as to my agreement with his efforts in the previous Congress to craft a law to deal with these unfair trade practices.

In fact, it was at a confirmation hearing more than 3 years ago that Senator Heinz—with consummate skill—extracted from me a promise to give him an administration endorsement of the predecessor bill. He did so in part by mentioning his unsuccessful efforts in preceding years to get the executive branch's attention turned to this somewhat esoteric subject.

Well, I delivered on that promise within about 6 months, and I continue to believe that it is essential that we, working together, enact into law a measure like S. 1351.

I can give you the administration's support for the concept embodied in that bill today.

I would like to say that, working closely and enthusiastically with staff, we could work out the rather minor adjustments to S. 1351 that could speedily move it on the path toward enactment.

Thank you, sir.

[Secretary Olmer's prepared statement follows:]

TESTIMONY OF LIONEL H. OLMER, UNDER SECRETARY OF COMMERCE FOR INTERNATIONAL TRADE

Mr. Chairman and members of the subcommittee, I am pleased to appear before you today to testify on S. 1351, a bill to amend the unfair trade law as it applies to nonmarket economy countries. The Administration supports the objectives of S. 1351. The current law is unfair because it is exceedingly difficult and leaves petitioners and respondents uncertain as to how it will be applied. We think that domestic industries, foreign governments and producers, importers, and the Commerce Department as administrators of the law, would all fare better under the artificial pricing test that would be established by S. 1351.

DIFFICULTY IN APPLYING THE ANTIDUMPING LAW TO NME'S

In applying the antidumping law to NME's, we have found the present statute and regulations to be enormously burdensome and excessively complicated, in comparison to the law as applied to market economies. The results are often unpredictable and based on the commercial behavior of a producer who is not engaged in unfair trade.

Briefly, the antidumping law should provide a remedy for U.S. businesses when foreign firms export goods to the United States at prices lower than those in their home markets.

In enacting the current antidumping provisions in 1974, Congress recognized that home market prices in an NME cannot provide a reasonable benchmark from which dumping margins can be computed. Instead, Commerce must use a "surrogate country" methodology; *i.e.,* we decide whether NME imports are dumped in the U.S. by comparing the NME's prices in the U.S. with prices of the same or similar merchandise sold in the home or third country markets of a surrogate market economy country that is at a level of economic development comparable to the NME. This means that we must find a surrogate country that: (1) is at a comparable level of economic development with respect to the industry at issue; (2) makes the product under investigation; and (3) is willing to cooperate in our investigation.

It has proven to be extremely difficult and time consuming to find a market economy that meets all these requirements. In some cases—like chloropicrin from the People's Republic of China and montan wax from the German Democratic Republic—the product of concern is made in only a few countries, and those are not at a comparable level of economic development. Even where several market economies at a comparable level of economic development produce the goods concerned, there is little, if any, incentive for their producers to provide us with the detailed information we require and to allow us to verify it by examining their books and records. For example, in 1982 we persuaded Finnish carbon steel plate producers to serve as our surrogate in investigating plate from Romania. The Finns provided us information and let us verify it. Then on February 10, 1984, United States Steel Corporation filed an antidumping petition on plate from Finland, using the very same information obtained in the Romanian investigation. You can imagine how dismayed the Finns were with the results of their cooperation; and how that experience has made it difficult to find cooperative surrogates in other NME antidumping cases.

Assuming we overcome these barriers, we base our dumping findings about producers in one country on prices charged by their competitors in another country. This is hardly a predictable method. Nor is it fair: the margins found often bear little relation to economic reality, and the NME exporter can only guess at which of its market competitors might become the surrogate and what level its "foreign market value" might be.

We often cannot find a suitable surrogate. More and more often, we rely on a "constructed value" methodology, by valuing factors of production in the NME concerned (such as hours of labor required, quantities of raw materials used, and amounts of energy consumed) in a suitable market economy, using largely public information (such as wage and transport rates and input prices). Even then we require some cooperation from the market economy producers to calculate factory overhead costs. We have used this method in 7 of our AD investigations to date involving NME's.

INAPPLICABILITY OF THE COUNTERVAILING DUTY LAW TO NME'S

We also believe that our experience in attempting to apply the countervailing duty (CVD) law to NME's underscores the need for prompt legislative change.

In final decisions in Czech and Polish wire rod cases last week, we concluded that bounties or grants within the meaning of the countervailing duty law cannot be applied to NME's.

After careful consideration, we concluded that subsidies are actions that distort the allocation of resources which would otherwise be determined by market forces of supply and demand. Subsidies encourage inefficient production. Where government control is the rule rather than the exception, we do not know how resources would have been allocated by market forces. Since in NME's (including Czechoslovakia and Poland) the government effectively controls production, pricing and marketing decisions, there is no market norm and therefore no way to identify any misallocation of resources.

The CVD law is market oriented. For example, domestic subsidies are defined to include loans made on terms "inconsistent with commercial considerations." the grant of funds to cover "losses," and the provision of goods or services at "preferential" rates. We believe that in an NME, we cannot identify any "commercial considerations," "losses," or even preferential treatment. Where a government controls all enterprises both directly (through central planning and establishment of prices) and indirectly (through many tools), it is impossible to discern what "normal" treatment is and thus what is "preferential."

Some will argue that our decision that the CVD law cannot be applied to NME's lets NME's "off the hook." The facts belie this. We have found preliminary dumping margins of nearly 60 percent on wire rod from Poland. In the face of significant preliminary dumping margins, the U.S. wire rod industry will be protected from unfair trade from Poland pending final Commerce and ITC determinations. And although petitioners did not file an antidumping petition on wire rod from Czechoslovakia, they are free to do so at any time.

Market economies can almost always compete internationally more successfully than NME's. The market economy manufacturer or exporter is in direct contact with buyers in other countries. As such, it can assess market trends. It will know which products are in demand and how to improve the product so as to meet that demand. It also will have the incentive to deliver quality merchandise, knowing that if it does not, the orders will not be renewed. The openness of market economies, in short, forces producers to be responsive to market forces.

In NME's, on the other hand, enterprises are isolated from such market forces. They do not have to compete with imports, and the producers rarely deal with the purchasers of their exports. Trade activities are directed by NME governments through foreign trade organizations (state enterprises). Because NME enterprises "sell" to the foreign trade organizations which, in turn, sell internationally, production and marketing decisions are uncoupled. To the extent that any "feedback" on international demands flows back to the enterprise in the form of targets or bonuses, international market conditions will likely have changed in the meantime.

Because the NME producer is insulated from international realities and often faces no domestic competition, it has no incentive, except government directives, to produce high quality or specialized merchandise. Like a monopolist in a market economy, the NME enterprise need not match the high standards that market economy consumers will demand and that market economy producers can meet.

For these reasons—because the enterprises are insulated from competition and because changes in world market conditions have to be transmitted to them through a foreign trade organization bureaucracy—they will not be able to compete as effectively as their market economy counterparts.

IMPROVED EFFECTIVENESS OF S. 1351'S ARTIFICIAL PRICING TEST

S. 1351 would establish a benchmark price—the lowest average price—and provide for additional duties to the extent any NME import is sold in the U.S. below that price. For over two years we have supported this concept as an alternative to the antidumping and countervailing duty law. We continue to support it, especially as improved in S. 1351 (by adding to S. 958, its predecessor, provisions for suspension agreements in investigations, administrative reviews and orders, revocation of orders, judicial review, duty assessment procedures, and certain procedural provisions).

Based on Commerce's four-year experience administering the AD/CVD laws, we think they must be substantially improved as applied to NME's. We believe the artificial pricing investigation proposed in S. 1351 would be simpler and more predictable than current law, and therefore the best way to protect U.S. industry against unfairly traded NME imports. Domestic manufacturers could more effectively anticipate the likelihood of relief, and weigh the costs and benefits of seeking relief. NME producers could price more fairly in the first place. Importers would benefit from increased predictability by not buying imports likely to be found unfairly traded.

We have two major concerns about S. 1351, which we are exploring this week within an interagency working group chaired by Commerce. One issue is which countries should get an injury test in artificial pricing investigations. The other is the level of the artificial pricing benchmark. Some domestic industries complain that use of the lowest average import price, as proposed in S. 1351, would allow inefficient NME producers to dump their goods in the U.S. down to the price levels of more efficient market economy producers. On the other hand, foreign governments and producers complain that use of this benchmark would preclude an efficient NME producer from selling here at a fair price reflecting his possible comparative advantage in producing the goods.

We will report to you as soon as possible the Administration position on these issues. We also propose several relatively technical changes to S. 1351, which are described in the attachment to my testimony.

In conclusion, the Administration believes that S. 1351 would be fairer, simpler and more predictable. We look forward to working with you to achieve its enactment at an early date.

TECHNICAL AMENDMENTS TO S. 1351

In addition to our concerns as to the proper benchmark and the scope of the injury determination, there are certain other aspects of S. 1351 which should be changed to make the provision more administrable, and to align it as closely as possible with the rationale and substance of the present unfair trade laws.

First, whatever the standard for comparison, certain safeguards need to be added to prevent unfair or distorted results. The benchmark price itself might be an artificially low price, perhaps depressed below cost of production by competition from the nonmarket economy country imports. Basing fair value on such a price would deny to U.S. industries the relief to which they would be entitled. In other cases, the benchmark price could reflect monopolistic or oligopolistic pricing practices in the U.S. and could contain extremely high and unjustifiable profits. Basing fair value on such a price would require the imposition of additional duties where none logically were warranted, and it would deny to U.S. buyers the benefits of fair competition that our unfair trade laws are designed to preserve.

Second, we believe consideration should be given to making adjustments in the prices to be compared, much as is done under the antidumping law. It is virtually certain that in most cases there would be meaningful physical differences in the products sold, or in the quantities or circumstances under which they are sold, which, if not adjusted for, would produce distorted, illogical results. (While these changes would add some complexity and uncertainty to the process contemplated in the bill, they would ensure equitable results safeguarding the legitimate interests of U.S. domestic industries, as well as exporters and importers.)

Third, the definition of "domestic industry" is overly broad. It includes producers of parts as well as producers of the finished article that is being investigated. For example, engine valve producers could file a petition leading to the imposition of additional duties on engines. Such a sweeping definition conflicts with our GATT obligations.

Fourth, the provisions allowing conversion from an artificial pricing investigation to a normal antidumping or countervailing duty investigation (or the reverse): (1) do not provide sufficient time to complete an investigation properly, and (2) envision provisional measures being applied for a longer time than is permitted under the GATT Codes.

Senator **Danforth**. Thank you, Mr. Secretary.

Are you confident that the measure that is used in this bill is the right one? As I understand it, it is the lowest average free-market price of the U.S. producer or foreign exporter to the U.S. market.

Secretary **Olmer**. I am not yet satisfied that that is the test criteria that the administration will support but within the week we should have an administration position on one of the two or three alternatives.

My own sense is that that is as workable as any other, and after running numbers against past cases I think it would do the job—that is, if we had used that as the criteria in past cases against nonmarket economies, the margins would have been appreciably higher than they were under the present law where, as you know, we use a surrogate country. I am satisfied that it would do the job.

Senator **Danforth**. You don't think that it serves as a safe harbor for dumping to have an artificial price?

Secretary **Olmer**. Well, it's a tradeoff, a tradeoff between the utter unpredictability and inefficiency of the present law, as against the possibility that you may even encourage monopolistic behavior or, in the alternative, as you say, a safe harbor for dumping.

The operative issue with regard to your question I think is our inability to determine what is dumping. We are throwing darts at a wall.

Senator **Danforth**. Don't the Europeans do it by just having an arbitrary quota figure or price?

Secretary **Olmer**. The Europeans do it by a process of jawboning that would probably wind us up either in jail or under Mr. McGrath's scrutiny.

Senator **Danforth**. And you wouldn't recommend that.

Secretary **Olmer**. Well, maybe to my successors and assistants, but not for me personally. [Laughter.]

Senator **Danforth**. About a month ago we had the hearing on small business remedies, and I know that the Commerce Department has been working on that. As I understand it, there has been a memo that has been given to the staff of the Finance Committee. Are we progressing on that with all diligence?

Secretary **Olmer**. Oh, yes, sir.

Senator **Danforth**. Because I know when I next see Senator Cohen he will ask me about it.

Secretary **Olmer**. I believe we are. Again, within the week, I am confident we will have a common position that will achieve the objectives that Senator Cohen wants and that you seem to share, and I do as well.

Senator **Danforth**. Will the administration have signed off on that in another week?

Secretary **Olmer**. Just about. I believe within the week, yes.

Senator **Danforth**. All right.

Senator Heinz.

Senator **Heinz**. Mr. Chairman, thank you.

First, let me thank Lionel Olmer for his cooperation over the many years—it seems like many years, it's only been about 3—that we have had an opportunity to work together.

And I thank you for your general endorsement of the approach taken in S. 1351.

To follow up on Jack Danforth's question regarding the administration position on the lowest average free-market producer price standard, is it possible that you will come back to us with a slightly higher standard than what we have? When I say "higher standard," for example, I think it is Congressman Frenzel over in the House who suggests you take all the free-market producers, lop off the bottom 10 percent, and then take the next one up the ladder. We are going to have some testimony that says you should have a weighted average of some set of producers. Are you looking at alternatives where you might have a somewhat higher standard?

Secretary OLMER. I think that a variety of criteria are being looked at. If you would permit me a personal observation, from all of the papers I have read—and that's a substantial pile—I am comfortable that the lowest average free-market price is the simplest and cleanest and would be an acceptable test. That's the one that people will have to talk me out of in the coming several days.

Senator HEINZ. Well, the analysis that you apparently have done comparing the results of the use of this test versus the use of current law, and your statement that the use of this test works well, is something that we would like to have substantiated for the record, as I'm sure all those people out there would like to see.

Let me ask you this: I think at least one of the witnesses we are going to have later on this afternoon is going to suggest that the petitioner or the respondent should be allowed to challenge the lowest average free-market producer price standard as either being too high or too low, depending on whether they are the petitioner or the respondent. Do you think that is worth considering, explicitly?

Secretary OLMER. I am afraid that it would lead us right back into trying to do that which we are attempting to get out of doing; that is, as I gather, the suggestion would permit a rebuttable presumption, and I think that that would be a dangerous road to go down—that is, I don't think we are ever going to be able to determine what is fair value in a nonmarket economy.

And if, by such an inclusion in the legislation, we encourage a petitioner to attempt to make the case that in a specific instance he has got the evidence—and I think a lot of them might be so encouraged—we would find ourselves doing much of what we are trying to avoid doing, which is time consuming and expensive for a petitioner as well as for the Government.

Senator HEINZ. One of the other areas where I believe your testimony indicates that there is still some interagency review going on is with respect to the injury test.

Secretary OLMER. That's right.

Senator HEINZ. S. 1351 is designed generally, and we would like to design it more specifically to persuade nonmarket economies to act as much as market economies as possible and give them incentives to share data with us, to tell us how they really operate their economies, and where possible to try therefore to get them to think a little bit more like we do.

If that is our goal, why shouldn't the injury test be applied to those who cooperate and denied to those who do not as a general principle?

Secretary **Olmer**. I think that the general principle that I would like to see adhered to is, first and foremost, that all those who get an injury test should be members of the GATT.

Now, as to cooperate, I think I would want to look at what the definition of cooperate means. I think that it is fine for us to have as an objective getting nonmarket economies to act more like we do, become more efficient and more open and so on. I think realistically it is unlikely to happen, especially in the large nonmarket economies, and probably with respect to many other of the smaller nonmarket economies as well.

I think, for practical reasons, we have to serve our own direct interests and therefore I am a little leery of committing to you now, Senator Heinz, on the grounds that I am not sure what you would mean by cooperation.

Senator **Heinz**. Well, by coming forward with the data that would allow you to pursue a normal countervailing duty or antidumping procedure. You just threw two countervailing duty petitions out saying it was impossible to investigate them—as I understand your basic reasoning.

I don't know to what extent, by the way, Commerce really investigated the allegations of the petitioners. I do not know to what extent you really considered the best evidence available. I understand you didn't get any cooperation at all from the other side, from the nonmarket economies involved in these cases.

The sad thing about all of that, to me, is that the action of the Commerce Department, while it probably helps the passage of S. 1351, nonetheless undercuts for now the incentive for any nonmarket economy to share information with us.

Secretary **Olmer**. Senator, I think that the issue is not one of whether they will cooperate in the provision of information but the fact that we don't know what represents fair value—there is no standard against which to measure fair value. And I think all of the data in the world is not going to allow us to make a precise determination in that regard, even if they gave us access.

Senator **Heinz**. I hope you are wrong. I can't say you are wrong, but if that is the case, what you are saying is that they are going to remain monolithic, unchanging economies forever, that they will always be nonmarket based, that market mechanisms will simply not be allowed to creep in to their economies, in spite of the fact that there is evidence it is happening in China—at least as shown on television when the President visited that little marketplace out there; it may not have been a typical one, but he was allowed to see it; and as evidenced by the fact that I guess, God rest his soul, if Russians who do not believe in God have souls, Chairman Andropov apparently was trying to introduce some market-based concepts into the Soviet Union.

Let me just ask you this last question:

You are saying that we should extend the injury test to all GATT members. We kind of have to, I guess. Do you also intend to extend it to those who have assumed equivalent obligations?

Secretary **Olmer**. The question of to whom an injury test should be granted in the context of S. 1351 is again a matter under review in the interagency group, and I have been promised a consensus, a recommendation, by the end of this week.

Senator **Heinz**. Let me suggest that when we talk about equivalent obligations, one thing that we want to make clear is that the obligations ought to be equivalent to those that are assumed by members of the GATT.

Secretary **Olmer**. Yes.

Senator **Heinz**. And not some bilateral kind of agreement.

Secretary **Olmer**. Yes.

I have to say that, given our decision in the Polish case and the Czech case, the wire rod cases, it is our intention not to apply the CVD law to nonmarket economies in the future.

Senator **Heinz**. We noticed.

Secretary **Olmer**. Well, it is surprising, Senator; hardly anybody else did.

It would seem, therefore, that the issue of equivalent obligations and an injury test is something that would be applicable only to the dumping law, not to the CVD law. And I agree that substantially equivalent obligations ought to be a benchmark, in my view.

Senator **Heinz**. Thank you.

Secretary **Olmer**. It is a question of how you measure it, and we get back into that question of determining what is a subsidy and our conviction that we can't measure it.

Senator **Danforth**. Senator Mitchell.

Senator **Mitchell**. Thank you, Mr. Chairman.

Mr. Secretary, I apologize for not having been here during your statement.

I would like to ask, regarding the proposed artificial pricing remedy, about a situation that is outlined in the prepared testimony of a later witness, Mr. Greenwald, relevant to the textile industry:

The proposed remedy would use, as I understand it, the lowest price of a producer in a market economy if that price is lower than U.S. producers' prices. In order to file a dumping case, a petitioner must wait until injury has occurred. By the time the petition is filed, other foreign suppliers from market economies will have had to lower their prices to compete with the dumped products of the nonmarket producer, the nonmarket economy producer. And in this situation, the proposed artificial pricing remedy would appear to understate the actual margin of dumping, if I understand what Mr. Greenwald will state, that that is a concern of the textile industry.

I would ask how the administration would propose to deal with this situation.

Secretary **Olmer**. Well, I think that the Congress can be very helpful in that regard, in making it clearer that the threat of injury is an equivalent basis on which an action can be brought, so that the petitioner would not have to stand by and wait for injury to have actually resulted from an unfair trade practice.

Senator Mitchell. Now, in other prepared statements a number of witnesses refer to the recent Commerce decisions regarding steel wire rods from Poland and Czechoslovakia. Would you briefly explain what those decisions held, and what implications they have for any future countervailing duty cases against nonmarket economy producers?

Secretary Olmer. We dismissed the petitions on the grounds that the countervailing duty law cannot be applied to a nonmarket economy. The significance is that we will not apply the countervailing duty law to any subsequent petitions brought against a nonmarket economy country under the CVD law.

I would point out that the CVD law has been on the books since 1890, and until Mr. Greenwald made it famous last summer it had never been used against a nonmarket economy, ever. We helped to put that back in its box.

I don't mean to be facetious, but in other words, Senator, petitioners have long believed that they can get justice and equity under the dumping law, and indeed I have maintained that they can and will. And in the case of one petitioner that brought both a countervail and a dumping case against the Poles, he is getting a 60-percent dumping margin. That's not bad.

Senator Mitchell. Well, I will let Mr. Greenwald make his own case; but the mere fact that something has been done for 75 years is no reason to continue doing it, and the mere fact that something has not been done for 75 years is no reason to continue not doing it.

Secretary Olmer. Of course.

Senator Mitchell. It seems to me there has to be some substantive reason to discontinue the practice or to initiate the practice other than the fact that it has been done or has not been done this way for a long time.

Secretary Olmer. I, by recourse to attempted levity, obscured the point I was trying to make; that is, the dumping law and the countervailing duty law have both been around for a long time, and until last summer the dumping law was believed to be adequate to resolve unfair trade practice assertions by U.S. petitioners. It was believed such, I think, because it was proven to be so adequate, in addition to which the trade bar, professional journals, opinions of most lawyers in Washington, seemed to hold—in fact I think without exception—that the countervailing duty law couldn't be applied against a nonmarket economy; the matter became a major issue when a case was filed last summer.

We have tried. It isn't as if we don't want the work; we've tried. We have agonized over it, and the decisions in these two cases that you have asked me about were not arrived at lightly by the Secretary. It involved an enormous amount of staff work and an awful lot of arguing back and forth as to what the right judgment was. He knew it was a rough call to make and that it wasn't going to be an easy decision, and that there were going to be some people who would take issue with it. But on balance we think it is the right one to have made. We simply can't make that law work against nonmarket economies, and we need the Congress to take action to provide us with an improved mechanism for dealing with unfair trade practices against nonmarket economies. And that is the subject of S. 1351, which the administration supports.

Senator **Mitchell**. Thank you, Mr. Secretary.

Senator **Danforth**. Lionel, thank you very much.

Secretary **Olmer**. Thank you, sir.

Senator **Danforth**. Next we have Mr. Richard Cunningham and Gary Horlick.

STATEMENT OF RICHARD O. CUNNINGHAM, ESQ., STEPTOE & JOHNSON, WASHINGTON, DC

Mr. **Cunningham**. Mr. Chairman, my name is Richard Cunningham. I am a member of the law firm of Steptoe & Johnson, Chartered, and I am testifying here on my own behalf and not on the behalf of my firm or on behalf of any clients.

I would agree with Lionel Olmer that the need for this statute is very clear. My testimony in written form, which I would like to have incorporated in the record, goes to some length to discuss what one would not be going too far to call fiascos of the application of the antidumping law and the countervailing duty law and section 406, to nonmarket economy imports.

I would like to spend just a moment today briefly agreeing with the standard that this bill adopts and responding very briefly to the criticisms that I know are going to be leveled at that standard from both sides today.

On the one hand you will hear people say that the standard offers insufficient protection, that it should be a higher standard based on some average of U.S. producers or some average of foreign producers. I disagree with that. I think it is very clear that Mr. Olmer is right, that this test would result in more cases being won than under present law, dramatically more cases, and in higher duties being imposed in those cases that are won.

In every dumping case where I have been involved in representing a petitioner—Polish golf carts, Hungarian light bulbs, Yugoslav nails—the dumping margins would have been substantially greater under this test than under the test that the Department was then using.

I think it is equally important that this test gives a clear standard that a petitioner can, without massive economic analysis, decide whether he has a case. And I think, Senator Mitchell, that that is very important for the small petitioners that you have had such concern about. It is very costly to bring a case where you have to get an economist to try to analyze whether you have a dumping margin or not.

Senator **Mitchell**. Yes; but the real expense still, Mr. Cunningham, is lawyers. [Laughter.]

Mr. **Cunningham**. I will defer that question to another hearing. But I agree with you, sir.

Of course, others are going to claim that this standard is too strict because it doesn't allow for a theoretical comparative advantage for the Communist country exporter. In my view, that is a totally theoretical argument. We have gotten to this point because there are no real-world costs in the Communist world. One cannot analyze costs, one cannot analyze prices in a Communist country.

There is no such thing as a real comparative advantage; one has to set an artificial pricing standard. And this is as good a one as they will get.

I would like to express one concern I have about the statute, and that is on the injury issue. I believe in a tougher statute for Communist country dumping. I believe in this statute and its pricing remedy.

But I don't think that I can see either the policy reason or the GATT legality of protecting uninjured U.S. industries from unfair priced imports, just because the country involved is not a GATT member. Our GATT obligation is to impose dumping duties only when injury is shown; our obligation is not to do that just with respect to GATT members.

It may be that you would say that in practice no one could challenge us, and I may grant that; but I see no policy reason for us to say an uninjured U.S. industry should be afforded a greater protection—and this law would afford a greater protection—than we now afford to uninjured industries.

Thank you.

[Mr. Cunningham's prepared statement follows:]

STATEMENT OF RICHARD O. CUNNINGHAM

My name is Richard O. Cunningham. I am a member of the law firm of Steptoe & Johnson Chartered, and I am appearing on my own behalf. I have been working in the area of trade law for sixteen years, and in my practice I have represented both American companies seeking relief and foreign companies defending such cases. In representing these various clients, I have had extensive experience with the U.S. laws dealing with trade with nonmarket economy countries. I am testifying, however, not to present the views of any of these clients or of the firm, but rather to present my own views as a practitioner concerned about the failures of the present trade laws in this area. From my experiences I have reached the conclusion that reform of these laws is badly needed, and the approach represented by S. 1351 constitutes an important step in the right direction.

Both section 406 and the present provisions in the antidumping law and regulations dealing with trade with nonmarket economy countries are in major need of reform. S. 1351 proposed by Senator Heinz, should be adopted to accomplish such reform. The present statutory mechanisms are unworkable and yield wholly unpredictable results. They provide neither an adequate vehicle for U.S. industries to obtain relief nor meaningful guidance to U.S. businesses that wish to trade with nonmarket economy countries.

The important virtue of the Heinz bill is that it sets forth a clear, objective standard for determining whether relief from nonmarket economy imports is appropriate. It provides what current law lacks: guidance of U.S. businessmen as to when a viable case can be brought and as to how trade arrangements should be structured. It has the further benefit of enabling nonmarket economy exporters to understand clearly the rules that apply to U.S. trade with their countries.

My testimony today will discuss some of the special problems posed by trade with nonmarket economy countries and will analyze the inadequacy of present U.S. laws in dealing with those problems. Finally, I will discuss the ways in which S. 1351 would deal more fairly and effectively with the problems of this important but difficult trade area.

I. THE SPECIAL PROBLEMS OF TRADE WITH NONMARKET ECONOMIES

Trade with ~~non~~market economies is neither inherently undesirable, nor something that should be discouraged. Rather, such trade offers potential economic and political benefits for the United States, provided we recognize and deal both fairly and objectively with certain problems and risks inherent in that trade. Those problems and risks can be grouped into two basic categories: First, the risk that the nonmarket economy government may engage in deliberate and predatory practices aimed at markets or industries in the United States; and second, the possibility that the normal operation of the nonmarket economy may confer upon its exporters certain "artifical" advantages—"artifical" in the sense that such benefits are not available to U.S. firms which must compete against imports from the nonmarket producers.

The danger of predatory practices in exports to the United States by nonmarket economies was dealt with at considerable length in this Subcommittee's Report on Section 406 of the Trade Act of 1974. In that report, the Subcommittee expressed concern about two possible types of predatory export practices:

First, it was pointed out that the government's control of the factors of production in a nonmarket economy gives that government the ability, if it so chooses, to marshall the resources of that economy rapidly and to concentrate them on a flooding of an export target market, with the resultant destruction of the domestic industry in the target country. I must confess, however, that I would be hard-put to cite a specific instance in which such a flooding of a United States market has occurred. Be that as it may, there are ample weapons in the arsenal of U.S. trade laws, even apart from the present section 406, which are capable of dealing with such a threat if it should materialize. These include the Escape Clause and the "critical circumstances" provision of the antidumping law (which would also be applicable to a proceeding challenging "artificial pricing" under the legislation now being considered by this Subcommittee). This latter "critical circumstances" provision is particularly important in dealing with the threat of a "flooding" of a U.S. market, since these provisions appear in our statutes dealing with unfairly low import pricing. I doubt very much that a "flooding" would ever occur—or indeed could ever occur—unless the flooding were accomplished by means of unfairly low export pricing.

This brings me to the second danger foreseen in the Subcommittee's report on section 406. A nonmarket economy exporter, the report noted, is not governed by the same profit motivation as are its U.S. competitors. Accordingly, the potential exists for the nonmarket exporter to sell into the United States at unreasonably low prices that bear no relationship to realistic costs for the purpose of putting its U.S. competitors out of business or dominating U.S. markets. If there is a real threat of predatory practices by nonmarket exporters, it seems to me that the threat lies in the area of unrealistic pricing, rather than solely in the area of volume of imports.

Moreover, the problem of unrealistic pricing of nonmarket economy imports goes beyond those instances where such pricing would arise from predatory motivation. Much more frequent is the situation where the normal, everyday operation of the nonmarket economy may produce export prices that are artificially low. In a nonmarket economy, numerous factors may operate to bring about this result. For example, there is the previously-mentioned absence of a profit motivation for nonmarket economy firms. The government of the nonmarket country may desire exports as a means of maintaining or increasing employment levels, or of earning hard currency to buy needed imports.

Even where nonmarket economy firms seek profits, moreover, their cost structure may be unrealistically low because of the intervention of the government in the economy. Wages, or perhaps the cost of raw materials, may be priced by the state at unrealistically low levels. Energy prices are another major cost factor that may be kept artificially low by the state. In addition, the influence of state planning may result in the construction of manufacturing facilities that are much more highly automated than could be justified in a market economy with the same low labor costs. For all of these reasons, U.S. producers may legitimately complain that the prices charged for imports from the nonmarket economy are artificially low because they are not based upon the same free market consideration with which a U.S. producer must deal.

The true nature of the problem with which the United States must deal in trading with nonmarket economies is pricing—the fact that those economies operate in a different manner from ours, a manner which can produce artificially or unrealistic low prices. What is needed is a statute that governs pricing conduct in imports from such countries. Any such statute should satisfy the following requirements:

1. It should establish pricing criteria that are clear and objective, so the foreign exporter knows how to price its U.S. sales and the affected U.S. industry knows when it does or does not have a meritorious case to bring.

2. It should be nondiscretionary, so the results of trade proceedings will be determined on the merits, and not by domestic or international political considerations.

3. It should be administerable. The pricing standard should be constructed in a manner that it can be investigated and determined by the administering authority within a reasonable time period, using the resources available to the administering authority, and with a high degree of confidence the results obtained in that investigation will be accurate.

4. Finally, it should be a standard that, while ensuring against artificial pricing, will not in itself be an "artificial" standard. It should be based upon real world considerations, and it should not be a standard that will automatically exclude nonmarket imports from the United States.

I support S. 1351 because it meets these criteria. As discussed below, neither the present section 406 nor current application of the antidumping law to nonmarket economies meet these tests.

II. INADEQUACY OF PRESENT U.S. LAWS TO DEAL WITH TRADE FROM NONMARKET ECONOMY COUNTRIES

A. Section 406

While section 406 of the Trade Act of 1974 was enacted to provide an additional mechanism for relief to domestic industries if rapidly increasing imports from Communist countries disrupt domestic markets, no relief has been granted in the history of that provision. Section 406 has been equally unhelpful to U.S. importers, because neither the statutory provisions nor the ITC decisions under section 406 set forth any standards to enable the importer to know that its transactions with nonmarket economy countries comply with U.S. trade laws. Finally, proceedings under section 406 are very unpredictable, extremely costly, and are heavily influenced by political and international policy consideration purportedly outside the scope of the statute.

The section 406 cases have dramatized the impracticality of dealing with Communist country imports by means of a law that makes the ultimate decision discretionary and in which a meaningful standard is absent. The fact of life is that politics and diplomacy overwhelm economics and trade policy where discretionary decisions are made on Communist country imports. But these are improper considerations in the decision of trade relief cases. If the President feels that economic sanctions are necessary for security reasons, he should invoke the National Security Amendment rather than pretend to apply section 406. Yet as long as discretionary trade relief laws are available, the reality is that the Executive Branch will twist those cases to serve diplomatic ends rather than their true statutory goals.

At one point during my representation of Occidental Petroleum in the Russian Ammonia investigation, I asked myself: How would one advise a client who wanted to structure a trade agreement with a Communist country in such a way as to comply with U.S. law and insulate himself against import restrictions? I came up with the following list of recommendations:

Have the agreement reviewed in advance by all relevant U.S. agencies.

Obtain the approval of all relevant agencies.

If possible, get the endorsement of the President himself.

Sell the imported product consistently at or above U.S. market prices.

Look for customers who, because of their peculiar situations, need an offshore source of supply and would not in any event buy from U.S. producers.

The problem is that Occidental did all of this. Yet its agreement was still challenged and came within inches of being destroyed by a section 406 case. There must be a better way of dealing with nonmarket economy imports.

In summary, the cases have demonstrated that proceedings under section 406 are extremely unpredictable, subjective and extraordinarily influenced by foreign policy considerations. Moreover, these very costly proceedings have never provided any relief to domestic producers, while at the same time they have made U.S. companies wary of entering into legitimate transactions with nonmarket economy countries. Section 406 should be repealed.

B. The Antidumping Law

The antidumping law, as currently applied to state-controlled economies, is neither fair nor effective in dealing with the unique problems posed by trade with such countries. The methodology for determining fair market value set forth in the present regulations is ambiguous, vague and impractical in concept. The result is that the law is difficult to administer, provides no guidance to the U.S. businesses seeking to structure trade with nonmarket economy countries, and enables the administering authority to reach whatever result it wishes in any given case.

The current methodology for determining fair value departs sharply from the traditional (pre-1978) practice of the Treasury Department. Instead of looking to the distorted prices or costs of the producer in the nonmarket economy, Treasury prior to 1978 determined foreign value based on the prices or costs of the free-market producer most similar to the nonmarket economy producer in terms of items produced, degree of technological sophistication, and volume of production.

The current regulation rejects this "comparable producer" test and seeks to determine prices or costs based on those in a nonmarket third country which is deemed to be at "a level of economic development" comparable to the nonmarket economy. The only guidance in the regulation for identifying such a country is that comparability is to be determined by "generally recognized criteria, including per capita gross national product and infrastructure development."

The hierarchy of approaches to be used to determine fair value is by no means clear from the regulation. Apparently, if no comparable country can be identified, the prices or constructed value are to be determined from another market-economy country, "suitably adjusted for known differences in the costs of material and labor." If, however, a comparable country can be identified but similar merchandise to that under investigation is not produced there, a constructed value approach based on hypothetical costs of production is to be employed. Apart from the ambiguity of the regulation, it provides no objective standards by which a "comparable country" is to be selected and thus allows the administering authority unfettered discretion in making that determination.

Not only does the vagueness in the regulation increase the likelihood of influence from foreign governments upon the unrestricted decision-making of the administering authority, but the effect of the "comparable country" methodology in the regulation is affirmatively to favor importers from nonmarket economy countries. The reason that the methodology in the regulation has this effect requires a bit of explanation. The country where you will find an exporter comparable in size and sophistication to the Communist exporter is likely to be a country that is more advanced—and therefore where prices are higher—than a country "comparable in terms of economic development" to the Communist country. The reason is that the Communist country government often creates an exporter which is larger and more sophisticated than one would normally expect to find in that country. The goal is to earn hard currency by increasing exports, and therefore the government wants as large and as sophisticated a producer as possible. In a free-market economy comparable in economic development to the Communist country, on the other hand, producers would tend to be smaller and less sophisticated, both because the size of the domestic market would not justify a large-scale producer and because low labor rates would make a high degree of automation unnecessary.

Thus, what Commerce relies upon under this regulation is not the normal prices and costs that would exist if the exporter were located in a non-state controlled economy country. Instead, Commerce uses the significantly lower prices that prevail in a country where the exporter in question would not normally be located. The net effect of this is to produce a price comparison that is more beneficial for the exporter—more beneficial precisely because of the involvement of the government.

The second approach in the regulation, which is to be applied when a comparable country cannot be identified, ignores the economic realities of the nonmarket system. Under this approach, nonmarket third country prices are to be adjusted for known cost differences from the nonmarket economy production. This is impossible to apply for the same reason that the traditional antidumping analysis cannot apply to imports from nonmarket economy countries. Because of cost distortions due to government involvement in the activities of the nonmarket economy producer, its true costs are not known.

The hypothetical cost analysis required by the present regulation for determining constructed value is equally unworkable and illogical. Under the regulation, constructed value is based on the costs of producing the merchandise in a "non-state-controlled-economy country determined to be reasonably comparable in economic development" to the state-controlled-economy country if the specific "objective components or factors of production" incurred in producing the merchandise in the latter country were used. In other words, constructed value is based on "objective components or factors of production" valued in the surrogate country.

In addition to the obvious difficulties in applying this analysis, the analysis itself is fundamentally flawed. It is based on the incorrect assumption that the supply and demand and relatively scarcity of the various cost components in the surrogate and state-controlled-economy countries are identical. Indeed, precisely because of the cost distortions due to government intervention in state-controlled-economy countries, the relative costs of components are not likely to be the same.

In summary, the antidumping provisions applicable to state-controlled-economy countries are simply unworkable. Because of the vagueness of the law, the cases are increasingly vulnerable to diplomatic pressures that tend to influence greatly the outcomes. While the vagueness and the current methodology inure to the detriment of the domestic producer, it also prevents the U.S. business community from knowing how to structure agreements with nonmarket economy countries. A new approach is badly needed.

III. S. 1351 SHOULD BE ADOPTED

S. 1351 offers an objective standard that is tailored to the particular problems of trade with state-controlled-economy countries and it avoids the problems experienced under section 406 and the antidumping law. It provides guidance to both foreign exporters and the U.S. industry and would be easy to administer.

The "pricing" approach of S. 1351 is the correct one, because the greatest potential threat from imports from nonmarket economy countries would arise from artificially low pricing of imports. The bill provides that imports from nonmarket economy countries that are artificially priced below the "minimum allowable import price" are to be subjected to additional duties. The minimum allowable import price is defined in the bill as the lesser of the lowest average price of the most suitable United States producer in arms-length sales to American customers or the lowest average price of the most suitable foreign producer in a market economy in arms-length sales to American customers. This standard protects U.S. producers against the problem of abnormal, non-economic low prices. As to the other concern that nonmarket economy imports would "flood" the markets, I do not believe that this could ever occur unless the nonmarket imports are the lowest priced in the market. Even if such a "flood" should occur, it could be dealt with under the "critical circumstances" provisions of the antidumping and countervailing duties laws, which would be applicable to an "artificial pricing" case.

At the same time, the standard in S. 1351 is a relatively liberal one for foreign exporters, as it gives the state-controlled economy producers the benefit of the doubt by assuming that it can sell the product as cheaply as the lowest priced free-market participant in the market. I am not impressed by the argument that this approach forecloses the possibility that the state-controlled-economy producer may, "in the real world," actually have lower costs than the lowest-cost free-market producer. No one can ever know the "true" or "real world" costs of a state-controlled-economy producer.

In conclusion, S. 1351 provides a standard that is fair to both sides. While S. 1351 offers the foreign exporter a relatively liberal standard, it also addresses the legitimate concern of the U.S. industry about the possibility of unrealistically low priced imports from nonmarket economy countries. The standard is much more clear and objective, thus enabling the affected U.S. industry to determine whether or not it has a meritorious case for relief and the foreign exporter to know how to price its sales to comply with U.S. trade laws. I therefore strongly urge the Subcommittee to adopt S. 1351.

One aspect of S. 1351, however, requires clarification. Subsections (A) and (B) of section 749(a)(21)'s definition of "minimum allowable import price" refer, respectively, to "the most suitable United States producer" and "the most suitable foreign producer." However, the term "most suitable" is undefined and ambiguous. This leaves the administering authority wide latitude in selecting the producer whose prices will be the criterion of "fairness," and opens the door to undesirable political and diplomatic intrusion into the decision-making process. I strongly urge, therefore, that "most suitable" be defined as that producer whose production facilities are most similar in size, production processes, technology and degree of automation, and other capital investment to the production facilities of the nonmarket economy producer.

Finally, one aspect of S. 1351 should be changed. In its present form, the bill would deny an injury test to exporters from countries not party to the General Agreement on Tariffs and Trade. I believe that denial is bad trade policy and inconsistent with our GATT obligations. Even in unfair trade practice cases, it is not the policy of the United States to apply additional duties to imports unless those imports cause injury to U.S. producers. That is a sound policy. If U.S. producers are not injured, the U.S. actually benefits from the low—even if unfair—prices.

There is an exception to this policy in the countervailing duty law, where the U.S. "commitments policy" denies the injury test to exporters from countries not party to the GATT Subsidies Code. The purpose of that denial—to encourage governments to sign the Subsidies Code—has no relevance to the new artificial pricing standard, which aims at an exporter's pricing policies, not at government subsidies.

Moreover, the United States has agreed under GATT not to apply antidumping duties—and of course the artificial pricing provision is a subdivision of the antidumping law—without an injury test. That obligation, by its terms, is not limited to antidumping cases involving imports from GATT members. The denial of an injury test in such cases is thus, in my opinion, a GATT violation.

STATEMENT OF GARY H. HORLICK, ESQ., O'MELVENY & MYERS, WASHINGTON, DC

Mr. HORLICK. Mr. Chairman, my name is Gary Horlick of O'Melveny & Myers. I am appearing on my own behalf and not on behalf of the firm or a client.

It is a privilege to appear before this committee. I commend you, Senator Heinz, and Chairman Gibbons on the other side, for taking up this unfinished business from 1979.

The underlying assumption I think should be that U.S. workers and businesses are entitled to a nondiscretionary remedy against unfair trade practices from nonmarket economies.

Right now they have in the antidumping laws and the countervailing duty laws a nondiscretionary remedy dealing with imports from market economies. The problem is that the antidumping law as presently written to deal with nonmarket economies is quite open to manipulation by any administration which wishes to do so. This administration has not done so, to my knowledge, and that's a tribute to it; but the possibility is definitely there. I can tell horror stories about how one goes about choosing a surrogate; it is usually done about 10 at night when one has run out of any reasonable alternative.

Just to take an example, for Chinese shop towels we went through, in order: Pakistan, Thailand, Malaysia, Hong Kong, the Dominican Republic, Colombia, and wound up with a hypothetical Chinese factory in India. It just doesn't make sense.

Similarly, the countervailing duty law simply doesn't apply to nonmarket economy imports, and shouldn't. I agree with the decision that the Commerce Department issued last week. It wouldn't make any sense.

The solution, I think, is S. 1351 should be passed. The standard should be an objective one, and S. 1351 gives you something objective; it is something that the petitioner can check out, and even more important, the importer, if it is selling here and knows what the prices are, they know what price they would have to look at. If they are selling below the lowest prices, they would know that, and they shouldn't have any complaints about being found dumping.

More to the point, though, they could do the market research they have to do anyhow and ascertain where they can sell without being found dumping. It is not a safe harbor for dumping because there is absolutely no way of knowing if a nonmarket producer is dumping; there is no measure of costs, no measure of prices in a nonmarket economy, by definition.

The entry-level price here would permit continued trade with nonmarket economies, and it has to be a two-way street; but it wouldn't allow them the kind of low-ball pricing one has seen.

In addition, S. 1351 gives Commerce the ability to recognize liberalization in these economies. A nonmarket economy under S. 1351 can show that it has in fact achieved market characteristics and should be treated under the normal laws.

I would close by pointing out that probably the best solution for dealing with nonmarket economies is not to try to measure dumping margins; the concept makes no sense. The best solution would probably be to depoliticize section 406, to take away the discretion of the President to reject relief. Unfortunately, that doesn't seem to be feasible politically; the administration will never accept it. And therefore, I think S. 1351 is by far the best solution.

If S. 1351 is passed, however, I would suggest taking advantage of the overtly political nature of 406 and changing it to make a tool whereby the President can reward our friends and punish people we want to punish. This would give the President the opportunity to put into effect an economic sanction which does not shoot ourselves in the foot as some embargoes did.

I have submitted a fairly lengthy article which I prepared with Shannon Shuman of Coopers & Lybrand to staff, which contains all of these points in enormous detail. Thank you.

[Mr. Horlick's prepared statement follows:]

SUMMARY OF TESTIMONY OF GARY N. HORLICK, O'MELVENY & MYERS, ON S. 1351 AND ON THE NEED FOR REVISIONS IN U.S. TRADE LAWS CONCERNING IMPORTS FROM NONMARKET ECONOMIES

I. U.S. workers and businesses are entitled to a non-discretionary remedy against unfair imports from non-market economies.

A. The antidumping and countervailing duty laws (AD/CVD laws) are non-discretionary with respect to imports from market economies.

B. The antidumping law as applied to nonmarket economies is open to manipulation by any Administration which so desires.

1. In the notorious Polish golf cart case, the State Department allegedly "combed" the world looking for a golf cart producer with prices lower than the Poles' price for export to the U.S.—see documents released under FOIA request.

2. Using the current regulations, the numbers could be manipulated if one wanted to.

II. The current remedies are not non-discretionary or appropriate.

A. The results of cases under the non-market provisions of the current antidumping law have no connection with reality (PRC vs. Paraguay on menthol; Finland as the sixth choice for Romanian steel; Chinese shop towels—Pakistan, Thailand, Malaysia, Hong Kong, Dominician Republic, Colombia, hypothetical Chinese factory in India; Chinese mushrooms).

B. The countervailing duty law makes no sense as applied to non-market economy imports.

1. The Subsidies Code provided that such "subsidization" should be measured by the dumping calculation.

2. A subsidy is a distortion of the marketplace—it is absurd to attempt to measure subsidies in a fully controlled economy.

C. Section 406, enacted because of the inadequacy of normal dumping laws in dealing with non-market economies (S. Rep. No. 1298, 93rd Cong., 2d Sess. 210 (1974)) is overtly political—the President has denied relief in every case where it has been recommended. See *Anhydrous Ammonia from the U.S.S.R.*: Report to the President, 45 F.Reg. 27, 570 (1980).

III. The best solution is S. 1351 with some technical modifications.

A. The standard should be objective, and S. 1351's use of prices within the U.S. is objective, and readily ascertainable by anyone selling here.

B. An entry-level price will permit continued trade with non-market economies, without permitting the extremely low prices used by some entrants "buying their way in" to the U.S. market.

C. Comparative advantage is not a concept applicable to non-market economies—there is no way of knowing if their "real" prices are higher or lower than their export prices or U.S. prices, so no attempt should be made to measure them.

D. Technical suggestions.

IV. Really, the best solution would be simply to depoliticize Section 406, but that seems not to be feasible.

It is meaningless to try to pursue "real" costs, "real" prices, or "real" subsidies in non-market economies. Consequently, imports causing signficant amounts of injury in the United States should be subjected to quantitative controls, rather than attempting the impossible chore of calculating dumping margins. Presidential discretion should be removed, with the ITC determining the remedy, although with a chance for the Executive Branch to negotiate a different remedy if the ITC on appeal from the affected U.S. industry does not disapprove it.

If, however, the dumping laws are to be used for dealing with non-market economy imports, then we should take advantage of the political nature of Section 406, and use it overtly to reward our friends and as a sanction for behavior we dislike. Following this concept, Section 406 would be applicable to an enumerated listing of Communist countries which are subject to special consideration. Communist countries which currently receive MFN treatment would be tentatively removed from the list, and subjected only to the antidumping laws and Section 201, possibly with hearings after one year and five years to review the appropriateness of the removal of that country from the Section 406 list. The President would have emergency authority to add countries to the list of countries subject to Section 406. This would provide the President with a visible sanction which could be used as a foreign policy or international economic policy instrument that does not automatically "shoot ourselves in the foot" (as some trade embargos might do). In theory, the Presidential authority could be subjected to Congressional review, if the Constitutional problems raised by the Supreme Court decision in *Chadha* v. *INS*, 103 S. Ct. 2764 (1983) can be surmounted.

Senator DANFORTH. You both are lawyers. Why wouldn't this bill—and maybe it's a fine bill—but why wouldn't this be viewed with great enthusiasm by nonmarket economies? They would have nothing to lose by this. If they are producing goods at a price lower than the price artificially designated in the bill, why, that's wonderful; they just get to mark the price up. And not only do they get to, they must mark up to the artificial price, or else they will be violating the law. On the other hand, if they are producing something at extremely high cost and just want to get rid of it and create a little foreign exchange, they can dump it, and they know exactly what price they can dump it at. Why isn't this just something that takes a bad practice and blesses it?

Mr. CUNNINGHAM. I would say that a nonmarket-economy producer that thinks like a capitalist Senator John Danforth would definitely have that reaction, and indeed that sort of benefit would flow to a nonmarket economy from this bill.

The disadvantage that comes to a nonmarket economy is that this bill would effectively prevent a practice now quite prevalent from nonmarket economies of selling in the United States and in other export markets, not for the purpose of getting profits, not for the purpose of maximizing profits, but of earning foreign exchange and gaining market share in those countries by selling at very, very low prices, prices which we regard as uneconomic here in the United States but under current law we can't prove is uneconomic because there are no real world standards.

Mr. HORLICK. One thing which always impressed me in dumping cases involving nonmarket economies: It seemed, magically in every case, that was one product where the country had convinced itself that it had some sort of comparative advantage. It is a recurring theme that this was a product invariably under a dumping investigation where they were best.

Part of it is people convincing themselves of something which even in theory I don't think is possible, which is measuring comparative advantage in nonmarket economies, and what you will hear from some of them later, I suspect, that this deprives them of some mythical comparative advantage.

It becomes a point where I think I share Mr. Cunningham's view. You have governments doing this, and governments can convince themselves of a comparative advantage much more easily than businessmen looking for profit.

Senator DANFORTH. But if you set a price, isn't that just almost inviting them to do it?

Mr. CUNNINGHAM. Well, mind you, this bill doesn't set the price. Other producers in the marketplace would set the price. This bill only keys the——

Senator DANFORTH. Well, it creates certainty. I mean, it creates a much more visible target, doesn't it?

Mr. CUNNINGHAM. Yes; it does. But I think that is beneficial. I agree that there is a conceivable case where a high-cost Communist producer, if one could ever determine what its costs really were, could get some advantage out of this bill. And I must say that that's a tradeoff well worth making in view of all of the many advantages that this bill confers.

Mr. HORLICK. The impossibility in filing a petition now is simply guessing what Commerce will use as a surrogate. I can't remember a single petition—I may be missing a few—where the petitioner accurately guessed what Commerce would eventually do.

Senator DANFORTH. You touched on this briefly, Gary, but could each or you or one of you state what is wrong with section 406? I have to say that I am not familiar with the workings of it. It is my understanding that it is comparable to section 201, basically the theory being that if you are being hurt by a surge of imports you can get safeguard protection from those imports. Why not just use that? Why not just say, "Wait a second. Suddenly there is a flood of whatever the product is from Hungary or wherever, and we need relief. Provide relief"? Why go through anything that is artificial or convoluted?

Mr. HORLICK. I agree with you, Senator Danforth. The problem with section 406 is that the President has discretion to reject relief which the ITC recommends.

The real problem—and this will sound familiar in the context of 201—is somehow every case which was ever won at the ITC under 406 has been rejected by the White House. I cannot believe that there has not been a single case meriting relief—it sort of strains credulity. And that's why the only way to make 406 a workable solution is to remove Presidential discretion.

Mr. CUNNINGHAM. I concur in the basic thrust of what Gary says. In my experience—and I might add that I think you will hear a similar view from Mr. Potter, who will say that this is the one thing in the world that he and I can agree on in this area—it is that in Communist country trade the politics and the diplomacies is overwhelm the merits every time if you have a discretionary case. And the Russian ammonia case is probably the classic example of that, where the President swung back and forth 180 degrees in the space of 30 days because the Russians invaded Afghanistan. Now, diplomatically that may make eminent sense, but you shouldn't call it a trade law.

The one concern I would have with making 406 nondiscretionary and making no other changes is that 406 has a very low injury threshold. It was designed to be so because of special perceived threats from Communist countries and because there would be discretion. If you took away the discretion, I think you would probably want to tinker a bit with the injury threshold.

Senator Danforth. Senator Heinz.

Senator Heinz. Thank you, Mr. Chairman

Isn't part of the answer to Senator Danforth's concern about a high-cost producer being allowed to dump and a low-cost producer being guaranteed a high profit, with respect to the latter point, that the low-cost producer is going to make all of this money only if you believe that a nonmarket economy is inherently more efficient than a market-based economy?

Mr. Cunningham. I would agree with that.

Mr. Horlick. You are going to hear an entire panel imply that to you.

Senator Heinz. Is there any evidence at all that nonmarket economies really are the wave of the future where efficiency is concerned?

Mr. Horlick. Given the number of them that announce economic reform programs, I would doubt it. They don't seem to think so.

More to the point, what you have is a situation where, in Polish golf carts, for example, you had one country, Poland, exporting golf carts here, and again you would expect that the so-called export platforms around the world would also be doing that if it could be done less expensively than in the United States.

My feeling was that, first, you can't measure costs in nonmarket economies, it is a meaningless concept. If you can, many nonmarket economies have a lot of just basic inefficiencies built in from Government intervention. Government intervention is always being viewed as being unfair to U.S. producers, but in fact Government intervention can often be a real drag on efficiency overseas—or here.

Senator Heinz. Dick, do you have a comment on that?

Mr. Cunningham. Yes. I would basically agree with Gary. I don't dispute that it would be possible for a Communist country to set up an industry which would be an exceedingly efficient and perhaps the most efficient industry. They would do so by artificially, noneconomically, by the will of the state, diverting resources from other industries to that industry. And that is not what we call free or fair trade.

Senator Heinz. Now, turning to the second part of Senator Danforth's question regarding how a high-cost producer through this process might, in effect, have dumping legalized, or might obtain a safe harbor, let me ask you this:

Would our nonmarket economies be more likely to be able to dump successfully under current law or under the provisions of S. 1351?

Mr. Cunningham. There is no question in my mind—it is much easier to dump under current law.

Senator Heinz. Would you concur in that, Gary?

Mr. Horlick. I concur. Further, current law is so uncertain that it is harder to bring a case against it.

Mr. Cunningham. I think that is a point that is worth underlining. I talk with a lot of people in various domestic industries, and I think there is a fairly widespread view among many domestic industries that, except in a case where you are so severely injured by a Communist country import that you have no choice but to bring the case, it is not worthwhile bringing the case, because it is just rolling the dice; you have no way of knowing whether you are going to win or not, and why commit the six figures that it takes to bring a dumping case? Why throw that money away without some ability to predict whether you are going to win or not? This bill would change that.

Senator **Heinz**. Well, I assume we are going to hear from the next panel of witnesses or the panel after that that the standards should be higher, the procedures should be different.

We have been going through this discussion now for 5 years, and the only thing that I can conclude is that the present system is, as you say, not worth the paper it is written on, and that while we may not be able to get everything that everybody wants—indeed that's not the way this place has ever worked and I don't anticipate it will work that way in the future—we would be better off to get a procedure that has some certainty, that works well, and which will statistically do a good job if not a perfect job of protecting our import-threatened industries, particularly from nonmarket economies. I hope that there is some realism during the course of this procedure in this; otherwise, I will likely to be having to ask Senator Danforth to have hearings next year or the year after, or the year after that, on son of S. 1351, which was son of S. 958, which was son of S. 1966.

And I think Senator Danforth is probably as tired of having these annual or biannual hearings as I am. But I thank him nonetheless for holding them, and I thank you, gentlemen.

Mr. **Cunningham**. Well, I hope, Senator Heinz, you will persist, so we can get this bill through.

Senator **Danforth**. Senator Mitchell.

Senator **Mitchell**. As I understand it, the bill defines the minimum allowable import price as the lesser of the lowest price of the U.S. producer and the lowest price of a producer in a market economy. Now, this raises at least a couple of questions which I would like to ask you to comment on:

First, it would seem desirable that a case should be based on the actual cost of the nonmarket economy producer and that the law ought to be designed to encourage cooperation in providing such information.

But if the artificial pricing formulation essentially gives that nonmarket economy producer the benefit of the doubt, as it does by assuming it is as efficient as the most efficient producer in a market economy, United States or foreign, then you create a situation where if that nonmarket economy producer is less efficient, why wouldn't it simply withhold the necessary information? If that is the case, should there be some incentive to cooperate and provide information so that you can get the formulation based on actual costs to the extent possible?

Mr. **Cunningham**. Well, I must say that one of the first cases I wrestled with when I came into practice in this area was a nonmarket, economy case. And for 15 years now, I have been wrestling with the idea of how we get this nonmarket economy's actual costs. And I am firmly of the view that they aren't there; that there are no actual costs; that neither the cost figures nor the cost relationships are sufficiently free of government intervention that they can be any reliable guidance for trade law enforcement. They just aren't there, Senator.

Mr. HORLICK. I fully agree, based especially on my experience with these cases at the Commerce Department.

People would come and say, "Here is our cost," and I would say, "OK; and what is your currency worth?" There is no meaningful answer to that.

Mr. CUNNINGHAM. I would have the concern that you have, to some extent, if I weren't so firmly convinced that this bill will increase the strictness of the antidumping law as it is applied to Communist countries. I just so firmly believe that, and every case I have been in so firmly demonstrates that to me when I apply this standard to it in retrospect, that I really don't have that concern, Senator.

Senator MITCHELL. Let me ask you a second question, which is: Why should the lowest price be used to determine the artificial price? Could this not produce perverse results?

Let me give you an example. If there were two producers of the same product, one in a developing country and the other in a nonmarket economy, and they are equally efficient but neither is as efficient as a U.S. producer, in order to enter the U.S. market, both the foreign producers have to sell at the lower U.S. price. The producer in the developing country could be subject to a dumping case; the producer from the nonmarket economy would not. Is that a sensible result?

Mr. CUNNINGHAM. I don't think that's the way it would work; I think you would get a case brought against both of them. And one of the meanings I attach to the term "suitable producer" in here, although I admit it is not defined in the statute, is that one which is under investigation for or has been found to be dumping would not be a suitable producer to compare with a nonmarket economy producer.

There is one thing I want to introduce here that arises from your question. You are choosing an artificial standard; so you say, "Where are we going to set it?" It is an artificial standard. We are going to be taken to task under GATT for establishing something artificial. It seems to me we must be able to defend that as being somewhat liberal. That doesn't mean it has to be the lowest. I think the lowest is good for us because it increases the toughness of our enforcement despite the fact that it is the lowest.

And I am very much opposed to averages, such as the average price of all imports, multiproducer averages. The reason for that is that once you start doing that, the bill loses something that I think is one of its great charms—that is, it sets a clear standard.

A U.S. producer wants to know, when he brings a case, whether he's got a good chance of winning it or not. If he has to determine the average price of all imports, generally he doesn't have the data to do that, and he can't determine that. If he looks at the price of the imports from one producer, he can do that. Or if he looks at the lowest price of sales by one U.S. producer, he can do that.

I would hope that we could retain that advantage to the bill.

Mr. HORLICK. I would go a bit further. You will never know that a nonmarket economy producer is as efficient, more efficient, or less efficient than a market economy one, because there really is no way to measure.

In setting a standard, any standard, what you are looking for is something which is going to work. You cannot set that standard trying to measure the amount of dumping, because it's a futile exercise, it's truly tilting at windmills. Instead, you look for something that will protect U.S. producers from the abuses we have seen in the past, and we have seen them; but at the same time, make sure there is some access to the U.S. market. If you set it at the average, quite frankly, most nonmarket economies don't sell very well here. There is a lot of consumer resistance, there is consumer unfamiliarity.

You could set it at the highest price and simply cut off all trade--but that is not the point. The point is to find something that allows some access without permitting abuse. I think that the lowest average price does that. It may be necessary to go to something like Congressman Frenzel's suggestion, which I found quite interesting. But to go up to an average price is really a disguised form of simply saying we don't want to trade with these people—which is a perfectly legitimate decision, but it is not the one at issue.

Senator MITCHELL. But you say that you'll never know whether a nonmarket economy producer is more, or less, or as efficient as a free market economy producer. Is not our entire economic system based upon the premise that you do know, and that it is not as efficient?

Mr. HORLICK. That, Senator, is the whole problem. Our whole economic system and our trade laws are based on that. All of our trade laws are based on the theory that the most efficient producer should win. And here you have these guys where you just can't tell, there is no way to tell. And that's why you have to come up with a construct. You want a construct that works; you don't want a construct that tries to measure efficiency, because it's not possible. That's the exact problem. Our whole system assumes you can measure efficiency, and here is the place you can't.

Senator MITCHELL. Thank you, Mr. Chairman. Thank you, gentlemen.

Senator DANFORTH. Does it matter if this is GATT-legal? I guess it doesn't when you are dealing with most nonmarket economies.

Mr. CUNNINGHAM. Well, some nonmarket economies are or very soon will be GATT members.

Mr. HORLICK. Both Poland, Czechoslovakia—with an asterisk—Romania and Hungary are GATT members, and China probably will be within a year. That's a guess.

Senator DANFORTH. Is this GATT-legal?

Mr. HORLICK. I believe that with the injury test it would be GATT-legal. Without the injury test, you would have trouble.

I would go a bit further and follow my friend and mentor, do we want to have protection for noninjured industries whether it is GATT-legal or not? And that is very much a question for this committee and the Ways and Means Committee; it's a policy question.

Mr. CUNNINGHAM. I would like to add one thing to that. One of the problems that we in the trade bar see with the trade laws applicable to a nonmarket economy is the one that both Gary and I, and to some extent Mr. Olmer adverted to, that is that the politics, the diplomacies, override the trade merits. We are talking about trade laws here.

I would just like to urge very strongly that, if you are to decide that some countries should not have an injury test, do it because there is a trade reason to do that, a trade-policy reason to do that. Please don't do it just because there is some political or economic purpose to kick those countries.

Senator **Danforth**. What conceivable trade reason could there be?

Mr. **Cunningham**. I can't think of any, frankly.

Senator **Danforth**. In other words, "Don't do it."

Mr. **Cunningham**. I could not have phrased it more succinctly. [Laughter.]

Mr. **Horlick**. The only reason it becomes an issue is because of the commitments policy, which was designed for very specific trade-policy reasons having to do with LDC's. The members of this committee are more familiar with that than I am.

My understanding is that there is just no way that the subsidies code could meaningly be applied to a nonmarket economy; it doesn't make sense. And to ask them to sign the subsidies code would be laughable.

Senator **Heinz**. Mr. Chairman, one question to follow up your line of inquiry.

The way S. 1351 works, at least at present, is, where an artificial pricing determination is being made, there is not always an injury test. But the Secretary can move that artificial pricing determination to one of two other tracks—either a countervailing duty or an antidumping track. And of course in every case there is an injury test for antidumping, and there is no injury test in countervailing if you are not a signatory of the subsidies code.

Now, that is not as clean a set of incentives as I would like; but the purpose is to have an incentive, to get a nonmarket economy to come cleaner or totally clean, if they can. And I gather you say there is no way they can ever come clean—the Poles will never be able to tell you what the coefficients of conversion were on the various factors of production.

I am told that we got pretty close to figuring out what the dumping margins were in the Polish golf cart case; we just couldn't get them to tell us, to give us that last little piece of information.

Are both of you saying that we should not have the structure that we have in this bill?

Mr. **Cunningham**. I am certainly saying that, and I would like to make two points on that:

The first is, I do think that it's probably not feasible for some of the nonmarket economy countries to become GATT members, and thus there is no incentive here that is going to work.

But I think, secondly, you have to think about what you are asking as an incentive. What we do in our commitments policy on the subsidies code is to say, "We'll give you a countervailing duty test if you will sign on and do what the subsidies code tells you to do as a government; that is, give up export subsidies and control domestic subsidies."

You are getting into a somewhat fuzzy area when you are dealing with a subject that is dumping, in essence, more than it is subsidies, because you are not dealing explicitly with Government policy. You will hear, I'm sure, the gentleman from Action Industries later today say that his supplier in Hungary, Tungsram, is a company that is to some extent operating independently of total government control, that the government doesn't set its prices, and an inducement to the government is not something that would affect a dumping type case.

I think there is really no inducement that you get by this bill that is at all analogous to the inducement that we have in the commitments policy; I don't think it is a proper analogy to take out of the subsidies countervailing duty law and transpose into this.

Senator HEINZ. Well, as a practical matter, most of these investigations, if they are going to go from the artificial pricing track to one of the two other tracks, they are going to go on the antidumping track.

Mr. CUNNINGHAM. That is correct.

Senator HEINZ. Because not even the best intentioned nonmarket economy could ever figure out what the nature of their subsidies were. And that, I have some reason to believe, is a fairly accurate statement.

But it does seem to me that the antidumping determination is more feasible, based on what I do know of Polish golf carts. So I think that there is a rationale that is a reasonable one, if not a perfect one, for retaining the lack of an injury test on the one hand, with the artificial price determination and the incentive to get it, by telling us what we need to know about an antidumping procedure.

Do you have a comment, Gary?

Mr. HORLICK. The incentive for the nonmarket economy producer in that situation would be to be measured by normal antidumping standards and hopefully show lower margins.

Mr. CUNNINGHAM. Absolutely right.

Mr. HORLICK. I think it is important to retain that possibility, so that if a nonmarket economy producer can measure its costs accurately it has some opportunity to do so.

Mr. CUNNINGHAM. I might say that I am prepared to live with this bill here, but I would rather not retain the possibility that Gary refers to; I would rather make this bill the sole criterion for judging fairness or unfairness of imports from nonmarket economies, put in an injury test applicable to everybody, and U.S. industries will get a lot more relief across the board, and it will be a fairer law for everybody.

Senator HEINZ. Is that to say you think that retaining the feature we have just been talking about will result in less protection of U.S. interests?

Mr. CUNNINGHAM. I would think so. It might. I am not sure of that, but it might. Yes, sir.

Senator HEINZ. I took away from your comments earlier that the reason you were against it was you had a philosophical problem with ever granting relief to an industry that wasn't being injured.

Mr. CUNNINGHAM. Right.

Senator Heinz. And, second, I thought I heard you say that you could never figure out either subsidies or dumping.

Mr. Cunningham. No. What I was trying to say is this: I think that our general trade policy here is that we do not protect industries from imports unless those industries can show injury from the imports.

We have an exception to that, that is, our commitments policy. The exception has a purpose. That purpose is to provide incentives for foreign governments to change some policy about the way they conduct their trade, that is, to give up export subsidies. There is no similar incentive that I see in this conditional-injury test, and that's why don't see existing here a valid reason for departing from our basic trade policy of not protecting uninjured industries.

Senator Heinz. Thank you.

Senator Danforth. Thank you, gentlemen.

Next we have Stuart Rosen, Allen Merken, and Peter Ehrenhaft.

STATEMENT OF EUGENE J. MILOSH, PRESIDENT, AMERICAN ASSOCIATION OF EXPORTERS & IMPORTERS, NEW YORK, NY

Mr. Milosh. Mr. Chairman and members of the subcommittee, I am Gene Milosh, president of the American Association of Exporters & Importers, and I would like to take just a moment to explain why we are vitally concerned with the resolution of the important issue of U.S. trade relationships with nonmarket economies. I will then turn the microphone over to Mr. Stuart Rosen, who has been part of a special working group of the association dealing with nonmarket economy imports legislation.

AAEI represents the interests of nearly 1,400 U.S. firms on a nationwide basis, all of which have a vital interest in the maintenance and expansion of an open world trading system.

Regionally our members trade in market, maybe market and nonmarket economies of the Far East, Eastern Europe, and other parts of the world. Accordingly, AAEI reviews legislation to determine whether enactment would further or frustrate the goal of open and expanded world trade.

Should the occasion arise, AAEI would hope to have the opportunity to address this subcommittee on the important overall issue of the trading relations between the United States and nonmarket economy countries and its impact on integrating the nations of the world into a trading system that is understood and consistent by all of those who export and import.

AAEI has concluded that the proposals as drafted in S. 1351 to inject a new artificial pricing standard into title VII of the Tariff Act of 1930, as a substitute for or a supplement to the existing antidumping and countervailing duty laws, would not be an answer to the problems inherent in dealing with imports from nonmarket economies under the existing statutes.

I would like to now introduce Mr. Stuart Rosen from the law firm of Weil, Gotshal & Manges.

[The prepared statement from the American Association of Exporters & Importers follows:]

STATEMENT OF THE AMERICAN ASSOCIATION OF EXPORTERS & IMPORTERS

Mr. Chairman and members of the Subcommittee, my name is Stuart M. Rosen, and I am a member of the law firm of Weil, Gotshal & Manges. I am appearing before you today on behalf of the American Association of Exporters & Importers ("AAEI"), and as a member of a special Working Group of the Association dealing with nonmarket economy imports legislation, to state the views of AAEI on the subject of the artificial pricing proposal contained in S. 1351 and the applicability of the countervailing duty law to nonmarket economy countries. At another time, should the occasion arise, AAEI would hope to have the opportunity to address this Subcommittee on the important overall issue of the trading relations between the United States and nonmarket economy countries.

AAEI represents the interests of nearly 1,400 U.S. firms on a nationwide basis. These firms are involved in exporting from and importing to the United States virtually every conceivable type of good and service. Our members include manufacturers, wholesalers, retailers, and service firms such as banks, insurance companies, brokers, forwarders, and transportation companies, all of which have a vital interest in the maintenance and expansion of an open world trading system. Consistent with that interest, AAEI reviews legislation to determine whether enactment would further or frustrate the goal of open world trade. For the reasons set out below, AAEI has concluded that the proposals contained in S. 1351 to inject a new artificial pricing standard into Title VII of the Tariff Act of 1930 as a substitute for or supplement to the existing antidumping and countervailing duty laws would not be an answer to the problems inherent in dealing with imports from nonmarket economies under the existing statutes.

The interests of AAEI's members lie in a system of open and free trade. A necessary part of such a system is the provision of means for injured U.S. industries to obtain protection against imports from nonmarket economy countries. Current U.S. laws, of course, provide such means. As this Committee is very well aware, the U.S. antidumping law contains special provisions for investigating complaints about unfair imports from state-controlled economy countries. These provisions, creating the so-called surrogate country method, have been part of the administering agency's regulations since 1968 and were added to the law by the Trade Act of 1974. Section 406 of the Trade Act of 1974 also contains special rules applicable to nonmarket economy countries. Under both the antidumping law and Section 406, imports from nonmarket economy countries can be restricted when the International Trade Commission determines that such imports have caused material injury to the complaining domestic industry. U.S. industries have successfully obtained relief under the antidumping law on numerous occasions.

AAEI will be the first to acknowledge that the antidumping law's current provisions, calling for the use of the price or cost of production of a producer in a market economy that agrees to cooperate, are less than entirely satisfactory. The identification of a market economy at a comparable level of economic development is time-consuming, and the use by the Commerce Department of price or cost information obtained from a "volunteer" competitor of the nonmarket economy respondents can be frustrating and disadvantageous to the interests of those respondents.

Although we acknowledge the problems inherent in applying the existing laws to imports from nonmarket economies, we can not support the proposal in S. 1351 to establish a new artificial pricing standard as a complement to the existing antidumping and countervailing duty laws. AAEI has four basic objections to that proposal. First, the artificial pricing standard would, at best, only marginally reduce the uncertainty that is inherent in the existing law. Second, the standard would be anticompetitive insofar as it would unfairly and conclusively presume that a nonmarket economy exporter can never be the low-priced seller in the U.S. market on a fair, competitive basis. Third, the refusal to grant non-GATT member nonmarket economies an injury test is wholly unfair and unwarranted, and is contrary to the interests of the United States in maintaining an internationally competitive domestic economy. Fourth, we disagree with the suggestion in S. 1351 that the countervailing duty law could apply to a nonmarket economy country depending on the attributes of a particular producer or sector.

Let me expand upon these points:

Although S. 1351 would narrow the search for a surrogate to sales in the United States by U.S. producers or market economy producers, it is hard for us to understand how this change would substantially remove the uncertainty that is inherent in current law. The identification of the "most suitable" U.S. or other market economy producer would entail many of the same problems that are now inherent in finding a willing surrogate producer in the appropriate surrogate country. And once that most suitable producer is found, it is still likely to be a competitor whose willingness to supply price or cost information is related to its interest in obtaining a competitive advantage over its nonmarket economy competitor. Further, as under current law, nonmarket economy exporters would have no way to know in advance who that most suitable producer would be or what that producer's prices are, thus making the exporters' pricing decisions hardly less hazardous than under current law. In short, the informational problems that plague investigations under current law would plague artificial pricing investigations as well.

Informational problems aside, there are glaring anticompetitive problems inherent in the artificial pricing standard. Can it really be that no nonmarket economy exporter can be the lowest-price seller in any product in the U.S. market? Although supporters of the artificial pricing standard have tended to dismiss the fact that the standard would violate the concept of comparative advantage, the simple fact is that there are products that individual nonmarket economy countries can produce most efficiently. These countries, which can have real cost advantages in terms of material or labor inputs, based on their skills, resources, and GNP levels, should not be precluded from selling in the U.S. market at prices that reflect those advantages.

The most unreasonable and unfair element in S. 1351 is the withdrawal of the injury test from nonmarket economy countries that are not GATT members. Certainly, the policy of the United States to withhold the injury test under the countervailing duty law from those countries that are not signatories to the Subsidies Code is precedent. First, AAEI believes the refusal by the United States to grant the injury test to signatories and non-signatories alike is wrong as a matter of policy and is in violation of the GATT MFN requirement and that, in any event, it would be a mistake to set up an additional derogation from the unconditional MFN principle. Second, the refusal to extend the injury test to countries that had never benefited from that test under the U.S. countervailing duty law is not a proper analogy for, and can not justify, withdrawing the injury test from those countries that have benefited from the test under the U.S. antidumping law to date. Aside from the inevitably adverse repercussions that such an action would have on our economic relations with the countries affected, including possible adverse effects on the ability of our own industries to export, the removal of the injury safeguard would deprive U.S. consumers and the economy overall of the benefits of low-priced, non-injurious imports. Under these circumstances, U.S. industries facing competition from imports from nonmarket economy countries should not be handed an open invitation to restrict any imports not meeting the minimum price standard that would be established under S. 1351, irrespective of competitive injury.

Finally, we get to the question of the applicability of the countervailing duty law to nonmarket economy countries, which S. 1351 assumes is feasible where the industry or sector of the nonmarket economy country under investigation is "market-oriented." AAEI is not at all certain that any sector in a truly nonmarket economy country can be sufficiently isolated from the pervasive effects of centralized government planning as to warrant the same treatment as a market economy country for purposes of applying the countervailing duty law. At best, AAEI believes that market forces might be overlaid upon the fundamental nonmarket resource allocations that initially bring the production factors into the sector in question. Thus, a further governmental intervention into that sector will not constitute an "exceptional event" of the type which, according to the Commerce Department's recent final determinations in the Czech and Polish wire rod cases, characterizes subsidies in market economies, as contemplated by our countervailing duty law. In short, AAEI believes that the distinction S. 1351 would create on an industry-specific or sector-specific basis would not be proper, and that any suggestions in S. 1351 that the countervailing duty law can apply to nonmarket economies should be removed.

While on the subject of the countervailing duty law and its applicability to nonmarket economy countries, AAEI wants to stress its wholehearted agreement with the Commerce Department's recent decision in the Czech and Polish wire rod cases that subsidies can not be found in nonmarket economy countries. That decision, which is consistent with the position taken by AAEI before the Commerce Department in the aborted investigation involving textile and apparel articles from the People's Republic of China, rested on the obviously correct view the countervailing law is designed to redress governmental interference with the operation of a market, and that governmental interventions in nonmarket economies are so pervasive as to make it impossible to identify any single governmental intervention as a distortion or differential treatment actionable under the countervailing duty law. AAEI urges this Subcommittee to recognize the validity of the Commerce Department's decision, which is consistent not only with the thinking of the best scholars in the field but also with the intent of prior Congresses that originally adopted and subsequently re-enacted the U.S. countervailing duty law.

In summary, AAEI opposes the passage of S. 1351, just as it did the novel application of the countervailing duty law to nonmarket economy countries. Should this Subcommittee nonetheless proceed with S. 1351 or other legislation, AAEI wants to emphasize the fundamental need to include an injury test, and to make that test applicable to all countries alike. U.S. industries that have no need for import protection certainly have no right to it.

Finally, AAEI welcomes the opportunity to comment on these important issues and stands ready to work with the Subcommittee toward their resolution.

STATEMENT OF STUART M. ROSEN, ESQ., WEIL, GOTSHAL & MANGES, NEW YORK, NY, ON BEHALF OF THE AMERICAN ASSOCIATION OF IMPORTERS & EXPORTERS

Mr. Rosen. Thank you, Mr. Chairman and members of the subcommittee.

I am sorry to have to break the euphoria this afternoon, because AAEI does support the objective inherent in S. 1351 of a simple, predictable, and fair statute. However, despite the good intentions of the bill, we cannot support it in its present form, for we are concerned that the bill does not meet these objectives. I will be brief in outlining some of the reasons. I can follow up on them in questioning.

First we recognize that nonmarket economy cases are complex. We have been through them. But that's true of all dumping cases these days.

Second, we would like to point out that our position is not a position that stems from an unconditional bias in favor of imports; rather, AAEI supports free but fair trade. The results of the recent skein of dumping cases against nonmarket economies hardly favor these importers.

The minimum allowable import price approach simply does not produce certainty, or if it does it will not produce fairness. Let me just tick off a few of the items that are not addressed specifically in the concept:

Differences in the product. What is a like product?

Who is the most suitable producer?

What about adjustments for differences in the merchandise? For differences in quantities sold? For differences in circumstances of sale—for freight, packing, credit, advertising, guarantees and warranties, duties, and so forth?

What about a difference in level of trade?

Either these items will be dealt with under the bill, or they won't. If they are dealt with, you are not going to have a simple investigation. If you are not going to deal with them, you certainly are not going to have a fair result. And by fairness, I am not talking about fairness to the importer alone. With these holes in the bill, certainly importers can work to achieve a way to import which will get around the stricture of S. 1351.

In short, you've got a new approach with grave uncertainties. It is not an easily ascertainable approach, and it is by no means necessarily fair.

I support the other remarks regarding the continued need for an injury test under the antidumping law. Thank you.

Senator Heinz. Thank you.

Mr. Merken.

STATEMENT OF ALLEN L. MERKEN, PRESIDENT, ACTION TUNGSRAM, INC., EAST BRUNSWICK, NJ

Mr. **Merken**. Thank you, Mr. Chairman and Senator Heinz.

My name is Allen Merken. I am the president of Action Tungsram of East Brunswick, NJ. With me is my attorney Arthur Downey, a partner in Sutherland, Asbill & Brennan.

Action Tungsram is a company jointly owned by an American company from Pennsylvania, Action Industries, and another major stockholder, as you heard earlier, Tungsram of Hungary.

Action Tungsram is a manufacturer of light bulbs. We are an American company producing today in excess of 50 million light bulbs a year in the United States and importing similar quantities, primarily from the country of Hungary. We employ about 125 people and we are about 7 years old.

I am here today because I'm very sensitive to the impact of our laws, particularly those laws relating to nonmarket economy countries.

In our early years we were faced with a dumping petition. Fortunately, the ITC found in fact no injury, and that case was dismissed, surely a reason for sensitivity to this present situation.

The present system I think is absurd. I think Senator Heinz described it very aptly earlier as being that way. It is without what we want to maintain, fair trade.

The present system is unpredictable, it is expensive.

I have read your new bill, and I very much appreciate the efforts being made to improve upon the present system. However, I still have problems; I am not comfortable. I am absent of any clear definitions, for example, "nonmarket economy." Is Hungary a country with a nonmarket economy? Or is a light bulb within the country of Hungary to be treated as a product of a nonmarket economy? Or is the light bulb within a market economy because that part of the industry might be defined as a market economy?

As a businessman, how do I plan my business, my long-term agreements, when I don't know how I'm going to be considered by the law within which I must operate?

Senator **Danforth**. Well, Hungary would certainly be considered a nonmarket economy. I mean, there is no doubt about that.

Mr. **Merken**. I thank you, Senator.

I have looked, and I've asked my counsel. I have yet to be able to be provided with a book of nonmarket economy countries as compared to those that are in fact market economy. But thank you. Now I know. I'll note it.

Another problem I have with what I have reviewed is the minimum allowable import price. I believe, as I was expected to say today by someone, that it is unfair, and it does assume that the nonmarket producer is not efficient. I must sell at a higher price, even if I am more efficient. I ask the question: Is that fair to the consumer? The lowest average price, an attempt at better definition; but what is the lowest average price? How is it calculated? From where does it come?

The suitable producer—how is he selected? Are we not seeking a surrogate country as with the older law? I am very confused here. Is the suitable producer West Germany? Or is it a company in Ohio in the United States? Does he produce a breadth of products such as what we do, or a narrow line of product?

Again, I say I am very appreciative of the attempt that has been made to improve upon a law that we are not comfortable with as a company, but I must also say that I cannot support the law in the form that it is presently presented.

I have one last comment. I would like to make a suggestion that possibly a study be employed applying the workings of this new law to some of the older problems that we have gone through, just to see whether or not it does a better job of bringing to a fair termination the kind of problems that we might encounter.

Thank you.

Senator DANFORTH. Thank you, sir.

Mr. Ehrenhaft.

[Mr. Merken's prepared statement follows:]

STATEMENT BY ALLEN L. MERKEN, PRESIDENT, ACTION TUNGSRAM, INC. OF EAST BRUNSWICK, NJ

SUMMARY

1. Action Tungsram is a manufacturer, importer and exporter. Its main product is electric light bulbs. The company faced in the late 1970s a dumping petition relating to imports from Hungary.
2. The present system of handling trade problems arising from nonmarket economy country imports is absurd, unpredictable and expensive.
3. Despite appreciation for efforts of the Subcomittee, Mr. Merken cannot support S. 1351. More study is required.
4. The market disruption provision (§ 406 of the Trade Act of 1974) should be repealed.
5. Very clear definition of nonmarket economy country should be provided, and it should be without ideological prejudice.
6. The concept of the minimum allowable import price is unfair to efficient producers.
7. The effort to set as a standard the prices of the most suitable producer carries with it many of the deficiencies which are contained in the current surrogate country approach. It will also be too difficult fairly to administer.
8. To test how S. 1351 might work, a study should be made employing the proposed system retroactively to the half dozen recent cases involving nonmarket economy countries.

STATEMENT

I am Allen L. Merken, President of Action Tungsram, Inc. of East Brunswick, New Jersey. Accompanying me is my counsel, Arthur T. Downey, a Partner in the law firm of Sutherland, Asbill & Brennan.

Action Tungsram is an American company which is a manufacturer, importer. and exporter. Our chief product is electric light bulbs. The two major shareholders of my company are Action Industries, Inc. of Cheswick, Pennsylvania, and an Hungarian state-owned enterprise, Tungsram.

My company has been an importer of electric light bulbs from Hungary since the company's beginning in the late 1970s. We also imported manufacturing equipment from Hungary, which has enabled us to become a significant manufacturer of electric light bulbs. Our imports serve to complement our domestic manufacturing capacity. Over the last half dozen years, our employment in New Jersey has grown from zero to 125 people and our annual sales are now in excess of $25 million.

Unfortunately for me and my company, we encountered the unfair trade laws as applied to nonmarket economy countries just as my company was getting started. An antidumping petition was filed with respect to imported light bulbs from Hungary. Fortunately, the International Trade Commission determined that there was no reasonable indication of injury to the domestic industry and therefore our case was terminated. Despite the correct result, the experience was unpleasant and left me deeply concerned by our system of dealing with imports from countries whose economies might be judged as nonmarket. In addition to my personal feelings, I remain troubled for commercial reasons: imports from Hungary remain important to the health of my company. Because of the present incoherent system, these imports remain vulnerable to attack, not because unfair trade practices are present, but because the system is inherently unfair.

There is no doubt that the present system should be changed. The system is absurd, unpredictable, expensive and unpleasant for everyone who touches it. I applaud Senator Heinz and the other members of this subcommittee who have taken the time to study this highly complex and conceptually difficult problem.

Even with my deep appreciation for your efforts, I cannot support S. 1351. This bill makes some improvements in the present system, but it contains more drawbacks. It is my strong belief that we should put even more effort into finding a proper solution than in being willing to settle for this bill. I would prefer to live a little longer with the present system—unpleasant as that prospect is—than having to live under an inadequate statute for a great many years to come.

My first concern relates to what is not included in S. 1351. An earlier effort to deal with this problem in the 95th Congress (S. 958), provided for the elimination of the present market disruption provision, section 406 of the Trade Act of 1974. Regrettably, the bill before you today does not touch section 406 at all. In my judgment, that market disruption provision is fundamentally flawed because it is based exclusively on ideological grounds: it is applicable only to communist countries without regard to their economic and commercial character. This is highly discriminatory. As a practical matter, this provision has not offered much encouragement to U.S. industries and has certainly been an impediment to importers from countries considered to be communist. I strongly urge that section 406 be repealed.

Turning to S. 1351, I find that it represents a clever and sophisticated way of attempting to solve the difficulties inherent in the present system. But, in some areas the bill stops short of clarity and predictability, and may as a result create confusion in new forms. For example, under this bill the Commerce Department would have 20 days in which to determine whether the "subject of the petition is a nonmarket economy." The result of that decision substantially determines the course of the investigation. Yet, that time period is quite inadequate to make a determination which in many cases will be extremely difficult. More troubling still is the lack of a useful definition of the term "nonmarket economy" country. Proposed section 749(a) offers as a definition a classic tautology. The Commerce Department has wrestled with this problem for some time with the present inadequate guidelines. The proposed definition offers no help. By that failure, the bill increases the hidden discretion of the administering authority in handling these issues. In developing a clear and helpful definition of this term, I believe it is imperative that the resulting definition be free of ideological prejudice. I recognize that a proper definition might capture certain third world countries and some noncommunist countries, but that result would be fair and defensible.

I am pleased that the bill, in some fashion at least, recognizes that an industry or sector in an otherwise nonmarket economy country can nevertheless be market oriented and therefore should not be subjected to the discrimination of the artificial pricing procedure. Regrettably, however, this determination of artificial pricing, and the suspension of liquidation and other security requirements have to remain in effect until a new preliminary determination is made under the normal procedure. This creates a significant unfair burden.

I might point out a curious, and perhaps unintended result of the procedure for changing methods, as contained in section 748 of the bill. If a normal countervailing duty petition is addressed to a nonmarket economy country which is a member of GATT but which has not signed the Subsidies Code, there would be no injury test. Because of that fact the government of that country might have an incentive to provide insufficient verifiable information, which could result in changing the procedure into an artificial pricing investigation in which there would be an injury test. Incidentally, I strongly support the bill's inclusion of an injury test for GATT members as an improvement over earlier versions.

The most significant flaw, I believe, relates to the conceptual part of the bill: the notion of a "minimum allowable import price." The bill defines this as the lowest average price to U.S. customers from the "most suitable" U.S. producer or foreign producer. This provision rests on the assumption that the nonmarket economy producer can never be the most efficient producer. I know of no study which supports that proposition. Of course, I do suggest that the nonmarket economy producer is always or usually the most efficient producer, but I do suggest that sometimes it can be the most efficient producer. In those cases a great injustice will result. This will be unfair not only to the foreign producer and the U.S. importer but also the U.S. consumer.

Although everyone agrees that the idea of a surrogate country is unworkable, this provision comes up with a quasi-surrogate in the form of the "most suitable" U.S. or foreign producer. There is no definition of "suitable", which means there is simply no way the nonmarket economy country producer or its importer can predict the standards against which its products will be judged. The absence of predictability in the present system (with respect to the selection of a surrogate country) is carried over into this bill by the creation of the surrogate ("suitable") producer.

A serious practical problem with this concept relates to the ability of the administering authority to ascertain "the lowest average price". For most products, slight variations will result in significant changes in selling price. Despite the best of intentions by Commerce in making appropriate adjustments, they can never be sufficiently precise. The error range will be so wide as to totally distort any resulting determination that the product is being sold at "an artificial price." Aside from the resulting unpredictability and unfairness, the administrative task would be overwhelming. It would also be very expensive. Moreover, the surrogate producer who is expected to supply accurate and relevant price information will by definition be a competitor. This situation, on its face, is unfair.

In summary, Mr. Chairman, I believe that S. 1351 does not solve the problem. I believe it would be unfair, unpredictable and difficult to administer. I suggest that you request the Commerce Department to engage in a serious study (with appropriate confidential portions) of how this bill, if it were law, would have impacted upon the half dozen or so nonmarket economy cases which have been concluded under the present system. This theoretical retrofitting would, I believe, reveal that the present bill would not have substantially improved the handling of any of those cases as to fairness, predictability, simplicity and expense.

Thank you for this opportunity to present my views to the Committee.

STATEMENT OF PETER D. EHRENHAFT, ESQ., BRYAN, CAVE, McPHEETERS & McROBERTS, WASHINGTON, DC

Mr. Ehrenhaft. Thank you, Mr. Chairman.

I very much sympathize with you and Senator Heinz in your lament of having to go through these hearings periodically on this same effort.

The burden of my testimony is that while many extravagant statements have been made as to why something is needed to change the existing system, I would like to suggest to you that you don't really have adequate facts on which to come to the conclusion that such a change is needed. I think that the existing system, in particular the kind of rule that we developed when I was at the Treasury from 1977 to 1979, using the surrogate country approach with simulated constructed value, which was used in the golf cart case, can be made to work, is a fair method, and if appropriately applied avoids some of the problems of unfairness that have been described to you today.

I don't think that it is appropriate for either Gary Horlick or others to use statements such as, "It is hopeless to find these facts," "It is impossible to determine the costs," or "One cannot come up with rational answers." I suggest to you that in the golf cart case and in certain other cases it was demonstrated that it is possible, with cooperating producers, to show what it takes to make the products that they export; that it is possible to value those inputs of production in countries of approximate equality in their economic structures, and that using such a test is not too difficult and no more difficult than the normal cost-of-production standard.

It is also not as arbitrary as any of the other proposed rules, because it would enable both the domestic industry and the foreign exporter to conduct studies ahead of time to determine whether the prices that the latter are using in order to price their products to the American market fall within some kind of a reasonable standard.

Therefore, my suggestion is that, before the law is changed one more time, a greater effort be made to implement the rule that was carefully constructed on the basis of an international conference that we held with U.S. Government participation, with participation of our trading partners, and with participation of nonmarket economy producers. If anything, the regulation should be changed to require that that technique be the first technique, rather than the last technique applied.

Until that is done, I don't think that one can fairly say that this standard does not work. I think that it is an assumption without factual basis.

That is the essence of my testimony. I also have submitted a written statement that I hope will be introduced into the record, sir.

[Mr. Ehrenhaft's prepared statement follows:]

SUMMARY OF TESTIMONY OF PETER D. EHRENHAFT, WASHINGTON, DC[1]

My name is Peter Ehrenhaft. I am a practicing lawyer in Washington and served as the Deputy Assistant Secretary of the Treasury for Tariff Affairs from 1977 through 1979. One of the major innovations of my tenture in that position was the development of the so-called "Golf Cart Rule" for antidumping cases involving products from non-market economies. The burden of my testimony is that the rule we developed is as sensible a solution to a difficult problem as you are likely to obtain. It has not been given a chance to work. It should be given that chance.

The concept of calculating "fair value" from simulated constructed value in a surrogate country is workable and is fair to all concerned. If the current regulation has been a problem, it has been such because both Treasury in my day and ITA at Commerce lacked the courage to adopt the simulated constructed value test as the first, rather than the last, resort for determining "fair value." If it were moved ahead of the efforts to determine prices or costs from third party producers in surrogate countries, the law would provide:

Domestic industry with a rule that they could apply to test possible costs of production in surrogate countries based on their own producing experiences, thus providing a fairly reliable indication of possible dumping by NME exporters; NME producers with a rule under which they could readily and fairly conduct studies to determine if they are pricing below what we would impute as their "costs," and ITA with a procedure in which verification could be accomplished with little more of a problem than in usual cost cases.

Equally important, such a system avoids: The need for cooperation of, and reliance on data from, "uninterested" third party producers; and the unfairness of relying on the process of U.S. competitors as the fair value benchmark.

The selection of appropriate surrogate countries is not a serious problem. ITA could periodically publish groups of countries it would accept as presumptively acceptable surrogates for the CMEA countries, the PRC and the Asian Communist states. Or it could leave the initial selection to respondents, but permit petitioners to demonstrate that in given cases the selection of a particular surrogate country was inappropriate.

A serious problem with the approach under consideration is its obvious underestimation of the difficulty of finding the "average price" of domestic products. It may not be too difficult if one is dealing with commodities off the shelf. But as soon as you deal with differentiated manufactured items, from golf carts to glue to truck axles to light bulbs (all actual cases in recent years), you must immediately begin to consider contentious claims for adjustments, similar in scope and complexity to those now faced in determining foreign market value of U.S. price. And all of that information about "actual" prices and necessary adjustments must be obtained from either "uninterested" third parties without incentive to supply the data or, worse, from parties with an adversary interest as U.S competitors of the NME exporter. Using third party prices was specifically deleted from the Act for all other cases in 1974.

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[1] Partner of Bryan, Cave, McPheeters & McRoberts; Deputy Assistant Secretary and Special Counsel (Tariff Affairs), U.S. Department of the Treasury (1977-79).

Such a system, no less than current practice, would make finding "fair value" a total guessing game for the NME exporters and is arguably contrary to our GATT obligations to the NME Code signatories (Poland, Hungary and Czechoslovakia).

An extension of these ideas was presented to the Trade Subcommittee of the House Ways and Means Committee at hearings it conducted almost exactly one year ago. I am, therefore, taking the liberty of submitting for your information a copy of that testimony and call to your particular attention pages 13 to 18, at which this issue is addressed in detail.

One important new development also deserves mention, namely, the Preliminary Affirmative Determination announced on May 2, 1984, in the case of Carbon Steel Wire Rod from Poland. In that case, the ITA found margins of 56.7 percent on imports from Poland, an NME, by comparing the U.S. sales prices of the Polish exporter with the "average ex-mill price of all imports of wire rod into the United States from January through March 1983," from countries other than the GDR, also an NME. The only adjustment to this average price was for commissions which the Polish producer gave selling agents in the U.S. By averaging these essentially unadjusted import prices—including those sheltered by the quantitative restraints of the EC-US "Steel Arrangement"—Commerce created a new standard of fair value unknown in the law and wholly out of the control or knowledge of the foreign exporter. It is a test that avoids all of the safeguards the statute mandates for our trading partners. It is a method of determining fair value that is the quintessential "quick and dirty" calculation that some domestic interests have long sought. But I suggest it is wholly inconsistent with the type of careful comparisons Congress has prescribed for all other aspects of this statute.

TESTIMONY OF PETER D. EHRENHAFT, WASHINGTON, DC [1]

My name is Peter Ehrenhaft. I am a practicing lawyer in Washington. As a number of the members of this Committee recall, I spent a good deal of time before you in 1978 and 1979, when I served as the Deputy Assistant Secretary of the Treasury for Tariff Affairs. We worked together then in drafting the Trade Agreements Act. We gathered in the Rose Garden to observe President Carter sign what we all thought was a good law. It is a disappointment that so soon after that law became effective, you feel compelled to look at it again.

My testimony may surprise you. I will not provide you with many suggestions for fine tuning changes in the law. I share your dissatisfaction with its workings. And I will, at the conclusion of my submission, comment briefly on some of the ideas that my successor, Gary Horlick, and his colleagues are considering that do make some modest alterations in the legislation now on the books. But I have much more basic notions I want to share with you:

First, do not be pressured into doing something new now.—Before any further tinkering is done with our already enormously complicated trade remedy machine, take a year or two for a serious and comprehensive study on what our existing laws have done and can do. No one knows. Sloganeering passes for facts. Find the facts before you act.

Second, stop thinking about trade as a calamity.—Our trade relief laws look at imports as though they were hurricanes. Think about imports as but one manifestation of the inevitable process of change. Imports are often no different than technologically new products. The right response ought to be a humane and efficient process for adjusting our work force and investments to that change. We should not build dikes against unstoppable waves.

Third, reduce the role of the government in trade disputes.—Most of the disputes about which you hear relate to access to the marketplace. Who will have that access and under what conditions? It should be the role of governments to establish the rules and to provide forums in which disputes about compliance with them can be settled. It need not be the role of governments to champion the rights of individual competitors. Consider shifting to investors and workers both the right and obligation to pursue their complaints about the behavior of their competitors through the same procedures they follow in protecting their domestic rights—through litigation. They then both bear the costs and collect the damages.

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[1] Partner of Huges, Hubbard & Reed; Deputy Assistant Secretary and Special Counsel (Tariff Affairs), U.S. Department of the Treasury (1977–79).

Let me now develop these points.

A. BACKGROUND

When serving in the last Administration, I was the administrator of the antidumping and countervailing duty laws and a principal negotiator for the United States of the GATT Antidumping and Subsidies Codes. I was one of the architects of the steel "trigger price mechanism." Having participated so actively in the creation of these elaborate rules, you might assume I would be one of their principal apologists. In fact, my thesis today is that the efforts going into the adoption and proliferation of these rules has kept our minds off what we really ought to be doing to solve the problems of our economy. I have come to suspect that our legal rules may impede, rather than facilitate, the creation of the healthy trading system we want.

Why is that so? There are a number of reasons which, while obvious, are worth recalling.

First, we happily live under a democratic government. But in such a system, there is an inherent bias against long-term economic solutions. They simply take longer than the time between most elections. No one needs to tell you of the tyranny of two-year terms of office. In that milieu, it is inevitable that the "quick fix" is the only solution the public demands and that candidates are forced to espouse. That consideration is always at the front end of solutions offered for our economic problems, although it should not be.

Second, it is a fact of political life that whether you are running for office or trying to stay there you are always better off promoting an initiative, rather than looking at past programs or conceding "benign neglect" may deal with a problem. You cannot leave matters alone; you must "do something." It is the only way one develops name recognition. It is an atmosphere in which foolish measures often become "law."

Third, we live in a world of rising expectations and demands for instant gratification. We expect the government to prevent unemployment, provide social security, assure not only subsistence but the good things of life. We want it all very quickly and cannot wait for even two years. That is one of the problems with our trade laws. They were most recently amended in 1979 with great publicity and promise to the American people. The laws, we said, would rapidly provide stability to protect our markets from predatory and unfair acts by others. They would restore American economic supremacy. That kind of rhetoric encouraged expectations for instantaneous results. We have created in our trading system a demand for, and a belief that it is possible to achieve, quick solutions to trade problems. It is my personal view, however, that most of our trade problems cannot be solved by the kinds of remedies that trade laws contemplate—and surely not with the speed you are urged to demand.

Fourth, we operate a world trading system built on 40-year-old premises of stability and moderated change. But those premises are not as widely accepted today as they were when first adopted. For one thing, most of the rules were adopted at our initiative by countries such as those that comprise the EC. If all the world were like that group, we could perhaps more easily solve our problems. But there are so many newcomers with diffeent cultures and values. Their demands are impossible to escape. The old system has not kept up with the pace of change.

If you agree with my observations—not very startling ones to be sure—where do they lead?

B. RECOMMENDATIONS TO THE COMMITTEE

1. Get the facts.—Before the law is changed again, it should be useful for this Committee to obtain some facts. You hear domestic industries complaining that before antidumping duties can be imposed, foreign sellers are rapidly shipping merchandise into the country to "beat" the onset of withholding. No matter how accelerated the procedure, and despite the fact that duties may now be applied retroactively in "critical circumstances," you are asked to reduce still further the periods of investigation and to make still more arbitrary the difficult decisions our law requires. At the same time, you hear foreign suppliers claiming that the mere initiation of a proceeding "chills" trade; that its successful completion "freezes" it.

You have no way of knowing who is right. You have no way of really knowing that any antidumping order ever issued has done to the trade in the commodity to which it applied. You cannot find out whether antidumping duties were collected on that merchandise or how much duty has been collected. The Customs Service has been trying to figure out a way to gather that information ever since I asked the question in 1978. They still don't have an answer!

Before you think of changing the law again, this Committee ought to commission a serious study of the trade laws and their effect. The GAO has made some beginnings, but much more is needed. You should know what happens when a proceeding begins. Does the trade in the affected goods slow down or is there a "rush" of imports? What about substitute merchandise? Is the trade scene a huge balloon—when pressed at one point, it just expands at another? Do other goods from the same producers enter? When we tried to limit the importation of foreign automobiles, we stressed the competition of Japanese-made small and inexpensive cars. But the "voluntary restraint" agreement appears simply to have pushed the Japanese producers into sending us their larger and more expensive vehicles that, in many ways, provide even more serious competition to our industry than cars in the lower end of the size/price spectrum. And for how long are the effects of trade restraints felt in the market? Do the U.S. industries revive from the "injury" the imports were found to have caused?

Why is it so difficult to find out the facts? There are a number of good reasons. First, the merchandise affected by one of our trade proceedings does not necessarily—in fact it usually does not—coincide precisely with the Item numbers in our tariff schedules. The products may be a subgroup or overlap a number of TSUS Items. However, our Customs Service keeps the statistics only in terms of TSUS numbers that do not isolate the products subject to trade relief orders.

Second, no instructions have been given to the Service to ascertain the exact amount of antidumping and countervailing duties it collects each year, either in the form of estimated or actual duties, on a case-by-case basis. Only aggregates are collected. The reasons offered for this lack of fact-gathering are wholly unpersuasive.

Third, the customs numbers are unrelated to the Census Bureau's Industry Codes. Therefore, it is very difficult to relate the information on imports into data on domestic production and sales.

Fourth, it is even more difficult to try and isolate the effects of antidumping and countervailing duty orders on the health or adjustment processes of domestic industries. Our economists' techniques may not be up to the task, particularly as the market tends to be dynamic, with new products entering all the time, with prices—particularly those that must be translated from foreign currencies—fluctuating constantly. The laws are built on a static model of stable prices and immovable relationships—a model that bears little relationship to the real world.

Fifth, as Peter Drucker persuasively argued in the Wall Street Journal a few weeks ago, no ones dares look at the adverse impact our import restrictions have on our export capabilities. We need to promote our exports by enhancing the competitiveness of our industries. We rarely do that by sheltering the firms complaining about import competition. But we put our heads in the sand before facing that dilemma.

Sixth, we never consider what good antidumping, countervailing and all other kinds of duties do to secure our economy in the face of the roller coaster on which the international value of the dollar rides. Its changes overwhelm in a month—if not even a day—duties laboriously computed in these proceedings. It is hard to find a duty order equal to 25 percent ad valorem under the Trade Agreements Act. Yet the Japanese yen, the French franc, the British pound have all fallen by such percentages during the past two years. That fact makes a mockery of longwinded negotiations on tariff rates at the MTN, no less than of the judicialized proceedings in which we engage before we impose special trade relief duties.

All these problems notwithstanding, with effort, sense and resources, important facts could be pulled together. They should be before you when you consider changing the law again.

2. If you can't (or shouldn't want to) beat 'em, join 'em.—You have heard speeches describing the underlying thesis of the trade laws summarized in the slogan "There's no free lunch." Although we nominally appreciate the "bargains" of low priced imports, we worry that foreigners will "capture" our market and then raise prices to unconscionable levels.

But have you ever been shown a convincing case in which that has occurred or was in danger of occurring? I have not. Even in the case of color television sets, in which foreign suppliers do seem to have "captured" most of the U.S. consumer market, it is hard to demonstrate that those suppliers are not delivering all the goods we want—at continued low prices. As consumers we should welcome such low-priced goods from reliable suppliers. The money we save can be used to acquire other goods and services, to build up export industries and presumably enhance life for us all.

I suggest that it ought to be worth your while to consider whether we should spend less time in fighting off imports rather than accommodating to, and building on, them.

As a point of departure, I will mention that not long ago, purely by accident, I happened to sit on an aircraft flight next to a gentleman who told me that his business had been making slide rules. You all remember slide rules—those old wooden things that we used in school to calculate percentages and sines as recently as the 1950's. His company had been very successful, his firm's beautiful slide rules were masterfully created, beautifully packaged in leather cases and kept by their owners as instruments of great value. But this gentleman's business was rendered obsolete in 18 months by the introduction of electronic hand-held calculators. His work force was discharged, his company's buildings sold, and his investment rendered worthless. He told me that there is nowhere in the United States or Europe today where a slide rule is made, unless as a curiosity or as a toy. As far as industrial utilization is concerned, slide rules do not exist. His business fell prey to a new product which totally superseded the old in everything the old did, but much more quickly and more accurately. And even more cheaply. Yet there was no way that the slide rule makers could make hand-held calculators. The technology was totally different. The distribution network was totally different. A real economic disaster occurred in that industry. But no one in the United States stood up to take care of, or even try to help, the slide rule makers. We had no program to do anything about their dilemma, except that of unemployment compensation for the workers. There was no program to help the investors find alternative resources or alternative allocations of their investments. We do have programs that help people out in natural disasters, such as a flood. We have government programs, such as the rules that were created in the Multilateral Trade Negotiations to help out when a trade "disaster" allegedly occurs. We compare trade with a calamity. Instead of seeing it as a benefit to our economy, we compare it to a flood. That, I suggest, is a very unfortunate kind of result. It treats trade, instead of as inevitable change—such as a technological development—as an unnatural happenstance.

Let me suggest to you that the difference between slide rules and steel sheets is really only one of quantity, rather than of quality. The problems that confront us in trade today, particularly in the "traditional industries" that most vocally seek your help—steel, textiles, footwear—are really "slide rule" cases.

The truth is that it is, of course, much harder to stand fast against the demands of 150,000 steel workers than 150 makers of slide rules. I recognize also that you face a big problem if you have to say to the people in Youngstown, Ohio, who have built churches, schools, parks and so on—"Dear Folks in Youngstown, you are obsolete, please all move to Albuquerque and make silicon chips." It's very hard for everybody in Youngstown to get up and move to Albuquerque. One cannot lightly sacrifice the parks, the schools and churches and, above all, the feeling of community that make up the quality of life that have made cities where some of these obsolete industries exist very happy environments for many years. Nevertheless, the notion that one is going to preserve Youngstown in its traditional form because it has the churches and schools and parks, and because its residents—and we, too—want to keep their quality of life, is, I think, somewhat akin to King Canute's commands to the waves to stop, when there is no possibility that those waves will stop.

When you look closely, the only other possible differentiation between slide rules and steel sheets may be that our national security requirements may require us to produce some steel sheet in the United States. But, frankly, I am not really persuaded that by producing obsolete products or using outdated processes for making what we now need, we better assure our national security. I think that arms control and a healthy world economic order are more likely to provide security than the continued production of items on uneconomic bases.

The prescription that I have is that from the government as a participant we need much more emphasis upon how it can induce sensible change and how our societies can cope with such change humanely. We need that much more than new measures to preserve the plants and jobs that now exist. In making that suggestion I don't believe that governments are going to be the most appropriate allocators of resources for adapting the change. Some suggest that one way to promote change is for governments to provide funds to the "winning" industries, rather than propping up the "losing" industries. It is another one of those great slogans. But is not the decision of the British and French to produce the Concorde a vivid example of how misguided such a policy can be? And the condition of most of the planned economies of the world are all the illustration we need that government officials usually lack the facts on which to act, and that even if they have the facts, they can't act on them quickly or sensibly enough. That is even more true in a country such as ours with its democratic restraints that I have cited earlier.

And so my prescription is a *reduction*, rather than a further *expansion*, of our reliance on the rules of the trade game which have been adopted recently. Instead of being so proud of our work, I believe we must recognize that the very creation of this elaborate system of rules stands in the way of orderly change. We ought to be thinking about ways that we can channel our resources to accelerate production change. Instead, our focus has been on how we best preserve the status quo and resolve disputes between those seeking access to it.

3. Create suitable private remedies for trade disputes.—Most of the "trade disputes" for which you are considering remedies concern arguments about access to customers. Are foreign suppliers pricing "unfairly" or are they receiving "subsidies" from their governments? Are they shutting off sales opportunities for our own producers in their own or in third countries?

For many of these problems, it is difficult for the private party to secure information, much less adequate relief from the laws as they exist. We need the countervailing duty law and Section 301 of the Trade Act. We probably *don't* need the antidumping title or Section 406.

At the present time, the thrust of all these laws is to encourage the government to become the champion of every aggrieved domestic producer. It is right for the government to care about its citizens. But why should the government always champion the side of American businessmen who have decided to make a product, rather than the side of American businessmen who have decided to import and sell a product? What about consumers or the producers of dissimilar, but competitive, goods? And why should the government be required—as it is—to sacrifice its larger interests in protecting national security or its more general international relations just because certain citizens feel a foreign government's policies favor their competitors. That situation was most poignantly presented to me while I served at Treasury: the continued existence of NATO's major submarine base in Spain was placed in jeopardy by the insistence of certain California olive growers that a countervailing duty of 2% be applied to Spanish Olives. In the end we applied the duty—and the Spaniards didn't close our base. Perhaps it was all bluster by all concerned all along. But it could have worked out badly. Our current disputes with Mexico affect a parade of products whose exclusion may still yield a bitter harvest.

I suggest to you, therefore, that serious consideration be given to getting the government out of many of these cases. Create a meaningful private remedy for the alleged wrongs of foreign entrants into our market. Is price discrimination a trade evil? We have domestic laws that purport to condemn it—provided, however, that it has an adverse effect on competition (not merely on some of the competitors). Apply the same rule to all products. Whether foreign or domestic, anticompetitive price discrimination should be outlawed. Those injured by the behavior should have a forum in which to pursue their claim and be entitled to a judgment that makes them whole. In our present world, it should not be the serious problem it was in 1916 or 1921 to secure jurisdiction over the foreign suppliers or their domestic distributors. Experience with the "revitalized" Section 337 procedure at the International Trade Commission demonstrates that private remedies can work well, rapidly and with adequate due process.

The Senate has been considering a few bills attempting to rewrite the Antidumping Act of 1916. That is a step in the direction I am advocating. But I would accompany the adoption of a meaningful remedy with a drastic reduction in the opportunities for invoking governmental actions under the 1979 legislation. It should be reserved for only the most major situations in which the government has "reasons of its own" for feeling the need or opportunity to participate.

4. Tinkering with the law as it is.—Let me turn now to just a few comments on some of the proposals that may be offered to you by the Administration to modify in a much more minor—and, therefore, to my mind, much less useful—way the Trade Agreements Act of 1979. As I have written elsewhere in more scholarly length, the Act (and its predecessors) appear to be aimed at what I call the "pimples on the trade landscape." Trade worth a few hundred million dollars, at most, is affected by these remedies. When we are faced with the truly large trade problems we shrink from applying what the law seems to have suggested is the "right remedy." In steel, autos, textiles, agricultural products—the imports and exports we value in billions of dollars—we apply political remedies. That alone ought to give you pause about the efficacy of what we have created.

But how does the Administration propose to tinker with our existing statute?

(a) Abolish interlocutory judicial review.—Our federal courts have wisely adopted rules that tend to prevent parties from engaging in what are called "piecemeal" reviews of interlocutory decisions. The notion is that a single appeal from all of the rulings of a trial court will eliminate many reasons for review, conserve judicial and public resources and, ultimately expedite the entire legal process. The theory does not always work. And there are numerous "safety valves" attached to the machine to permit occasional reviews of preliminary orders.

All of that sense, developed over many years by the federal courts, was cast aside in a frenzy to put the administrators of the trade laws into judicial straight jackets. Virtually every type of important interlocutory decision is made separately reviewable by the Court of International Trade. And that court has accepted the invitation it was extended. It has, indeed, encouraged second guessing harassed administrators during the far more leisurely pace of a law suit, sometimes sending the same case back to the ITC or ITA three or four times for new calculations that, in the end, seem to result in revised margins or duties measured in tenths of a percent.

The Administration will urge that such interlocutory reviews be abolished. They should be. Before they are heard, the case may well be at a far later and better developed stage—since, rightly, the proceedings are not stayed during the court review. Any errors made in preliminary stages should be reviewable—if they contributed to the final result from which an appeal is taken—as and when the final decision is reviewed.

(b) Simplify the protective order procedure.—After three years of experience with the procedure of divulging to outside counsel under protective order confidential information supplied to the ITA and ITC by the parties to trade cases, the process has become relatively routine. However, it cannot work effectively within the abbreviated time periods of the law if the agencies granting such orders must examine on an individual basis each document to be released. The agencies must be allowed and encouraged to adopt regulations that will routinely provide certain classes of information to outside counsel willing to sign standard forms of confidentiality agreements. Peculiarly sensitive information, such as customer names, input costs and the sources of information obtained by the agencies—categories now generally not released under protective order—could properly be excluded from the standard form of release. If the ITA proposes some regularized procedure for issuing administrative protective orders, it should be cheered on.

(c) Modify the § 751 procedure.—Probably no reform made by the Trade Agreements Act was more important than the enactment of § 751. For the first time, the law focused not only on the "front end" of the great tariff machine but recognized it had a large tail end that also deserved attention and time limits if it was to operate. It grew out of Congressional impatience with Customs' apparent inability to assess and collect for as many as seven years the antidumping duties allegedly due on imports of color television sets from Japan. And it mandated an annual review of each outstanding antidumping and countervailing duty order, at which time duties on the past year's entries would be assessed and a rate for collecting estimated duties for the ensuing year would be established.

While the idea was good, the implementation has turned out to be a real problem because it was not adequately thought through. Let me mention some of the problems and how the Administration proposes to cope with them:

Retain the law of the case.—In some senses, this is the most important issue. It concerns the extent to which any of the parties involved in one of these cases—including the government itself—should be bound to continue applying a particular decision once it has been made. If, for example, ITA decided in the initial fair value investigation that "certain electrical motors" constitute motors having a certain dimension, to what extent can any of the parties argue during the § 751 case that larger or smaller motors, or those with certain added or few characteristics, are within the scope of the earlier order? To what extent are newcomers, who never participated in the fair value phase of a case, bound by principles applied to their co-producers but left unchallenged by them perhaps because as to them—but not the newcomers—the rule had no material impact? If you follow current developments in this area of the law you will recognize I am not citing hypothetical cases.

On the one hand, a decision, once made, ought not to be open to constant revision each year. On the other hand, the market is not static. It responds to the fact that an antidumping or countervailing duty order has been put into place. The ITA cannot be blind to changes that are intended to circumvent the letter of its orders.

It seems to me the only sensible way in which this problem can be handled—at the same time that today's incredible strain on the Customs Service and Commerce Department is relieved—is to adopt an automatic "sunset" provision. Antidumping and countervailing duties should automatically expire, after, say, three years. Then, if the problem that gave rise to the order is renewed, a possibly more expedited procedure to restore the earlier order might be adopted. But a short time period of effectiveness would render less unfair the rigid application of a law of the case rule to all orders.

Permit sampling and averaging in the duty assessment phase.—Currently, only a significant perentage of home market and U.S. sales are investigated and compared in determining whether dumping has occurred. But every single import is examined after an order is in place for the to-the-penny calculation of the actual antidumping duty. This legacy of a more leisurely past ought to be dropped. The same samples that were considered adequate for finding the existence of dumping in the first place should suffice for establishing a percentage rate of duty applicable to each foreign producer shipping goods subject to the order. That duty rate would then apply to that producer's merchandise until the sunset of the order, subject only to the initiation of an action by the importer to have returned any excess duties collected because the foreign supplier's prices were actually revised by more than, say 50 percent of the amount of duty being collected, or an action by the domestics to have the duty increased by at least 50% due to renewed dumping. Such a program would, in part, parallel the EC's procedures and, I believe, markedly reduce the complexity and burden of the current procedure.

Reduce the allowable adjustments to foreign and domestic prices.—This is an appealing notion that ought to be firmly rejected. It is only through "adjustments" that account can be taken of the frequent differences between products, methods of marketing and selling techniques in foreign and the U.S. market. The siren song of a "quick and dirty" comparison must be rejected. It seems that the suggestion Treasury made and which found its way into the law to disregard "de minimus" adjustments—those with an impact of less than 0.5%—has not been effective. In order to know whether this threshold is met, just as much of an investigation is required as if the adjustment were not to be rejected merely because of its size. And to the extent that many antidumping and countervailing duties are in ranges of under 1 percent—as they often are, particularly after the first § 751 review—a "de minimus" adjustment of 0.5 percent may be equal to half of the entire duty!

If we persist in retaining these laws, we must apply them fairly. Fair comparisons of merchandise prices require recognition of the myriad adjustments claimed by all sides. It is only by shortening the duration of the outstanding orders that we can save our manpower from overwhelming workloads. That goal ought not to be reached by discouraging accurate product comparisons.

(d) Eliminate the application of the antidumping and countervailing duty laws to imports from non-market economies.—The problems of applying Title I of the TAA to imports from "traditional" suppliers in the EC or Japan are often regarded as minor compared to the difficulty ITA perceives in applying the law to imports from the so-called non-market economies. Having wrestled with this problem myself and being responsible in large part for the adoption of what is wryly called the "Golf Cart Rule" on the application of the antidumping law to imports from non-market economies, I am here to defend the approach now taken by the law. Contrary to the jokes made about the subject and the protestations of "impossibility" heard from my successors, I believe the rule we adopted makes sense (within the terms of the antidumping law as a given—perhaps not otherwise). It is a rule which a study by the GAO has endorsed as the best of the proposed alternatives. It ought not to be scrapped lightly.

Because this is a story with which I am so personally familiar, I hope the Committee will forgive me if I discuss it in some detail:

Golf carts produced by a Polish aircraft manufacturer for the U.S. market provided the quintessential "problem" case of imports from an "NME" under antidumping law. The product was made and shipped by an enterprise whose sole commercial market was the United States. As has been aptly stated elsewhere, "the Poles put the cart before the course": there being no golf courses in Poland, there were also no sales of the product in the home market. And, indeed, there were no real sales elsewhere, as sportsmen in other lands apparently regard their hikes through the links an important part of the game!

But although much fun has been poked at this Polish story, the *Golf Cart* case demonstrated convincingly that the antidumping law and the Treasury Department's handling of the problem before 1977 was, at the very least, not well considered. At that time, efforts were made to obtain the "fair value" of the golf carts from the prices at which an obscure Canadian producer sold a small quantity of carts. The results were unsatisfying to every participant in the case, (although echoes of that absurb procedure are now heard in cases involving certain textile products from the PRC). And when that Canadian producer went out of the business of making what Treasury had considered was as at least roughly comparable foreign-made merchandise, it was necessary to consider a new approach. Treasury said any new rule had to be: Fair, and not discriminate against the so-called "state-controlled economies" because of their political systems; consistent with existing principles of the antidumping law; and perhaps, most crucial, "administrable" by government officials (and, of course, the parties concerned).

Treasury ultimately adopted the rule that the GAO has confirmed meets these tests. In essence, it allows a producer in a state-controlled economy to utilize its own factors of production and to value them in a "free market" of comparable economic development to develop a "constructed value," as that term is generally understood under the antidumping law. However, unfortunately, the rule the Commerce Department applies allows this constructed value approach to be used only if more "traditional" techniques in calculating fair value, albeit through surrogates in market economies of comparable development, are inadequate or unsuitable.

The result has been that in almost all of the cases decided since 1979 in the initial stages (i.e., not under section 751 of the new law), the prices and costs of third companies, in countries other than those in which the goods were produced, were used to establish the "fair value" of the merchandise under investigation. In Steel from Poland, a Spanish producer's prices in the home market were used; in Menthol from the PRC, Paraguayan export prices to the U.S. served as surrogates; in Truck Axles from Hungary, an Italian company's home market sales are the reference. In the most recent decision, a further abbreviation crept in: In Griege Polyester from the PRC, the fair value was determined by averaging import prices from all third country suppliers.

In my judgment, this is not sensible policy. It flies in the face of legislation enacted as a part of the Trade Act of 1974 with respect to antidumping investigations concerning merchandise from other than the so-called state-controlled economies. Then, Congress specifically rejected as appropriate the utilization of third party prices and costs for establishing the "fair value" of a particular respondent's merchandise. It recognized the inability of such a respondent to exercise any control over the prices and costs of the third party being used. Congress did not want to deny to the very respondent in a case the ability to assure itself that it is not dumping (unless it retreats from the market entirely—which it surely is not the aim of the law to achieve). And yet that is the result of the "third party price or cost" rule.

Not only is the application of third party pricing or costs to respondent unfair to the exporter from the state-controlled economy (and thus violative of what I think is the first principle that ought to apply), it is also in many cases absurdly difficult to implement by the government. The GAO Report amply documents this fact. I can also attest to it from personal experience: When I was at Treasury we sought the prices of the U.S. manufacturers of golf carts—presumably the parties with the greatest interest in furnishing that data and most familiar with the reasons why it was needed and how it would be safeguarded and used. But even they were reluctant to give the government those facts. How much harder and more frustrating it is to search around the world for surrogate producers in other countries to supply facts about their sales and costs for a proceeding in which they have no direct involvement or even interest. The use of third party prices and costs is, therefore, not administrable. It ought to be scrapped.

If it were scrapped in favor of the simulated constructed value approach that Treasury proposed and that the GAO Report endorses, is that a rule that meets the principles I mentioned earlier? I suggest it does. It fairly allows a particular producer to attempt to demonstrate that its prices are not below its costs, and thereby gives that party some ability to control its market behavior. It also allows the producer from the state-controlled economy to try and show that it has a comparative advantage in making and selling the goods or services in question. Verification of input factors is no more difficult than the verification of other information routinely reviewed by Commerce or Customs officials in antidumping and other cases. And "pricing" these factors in a surrogate economy is not necessarily a difficult task—particularly if the burden is placed on the respondent to demonstrate a technique and selection process as the Polish producer of golf carts was well able to do.

If it is a sensible rule, why is it not being adopted? Criticism has focused, first, on the notion that a market economy of "comparable economic development" can be found in which the pricing aspect of the exercise is "reliable." I suggest that criticism misses the point. It is not necessary that the Administering Authority be satisfied that every criterion of "market development" be identical or even similar for the purpose in question. A rough comparability, to which most responsible economists would agree, is sufficient and, indeed, exists. The countries of Eastern Europe are, in many ways, at a stage of economic development not dissimilar to some of the market economies of the Mediterranean basin: Greece, Spain, Portugal. Comparisons of the costs of labor and energy and capital in those lands provides an adequate guide to "free world" costs of those same factors in Poland or Hungary. Moreover, to the extent that, as the GAO Report indicates, some of the inputs a particular state-controlled enterprise buys are obtained on world markets in convertible currency, there is no reason not to price those inputs at their actual prices. And as the economies of some of these countries move toward a "reform model," with less rigid central planning and even more freely convertible currencies, it may even be possible to use all of the internal prices and costs of those producers.

That is not to say that there are no difficult cases in which the rule might be hard to apply. With respect to the PRC, for example, I was one of those somewhat astonished to find the Commerce Department selecting as the surrogate for the most populous state-controlled economy in the world, what might aptly be termed a family-controlled principality in Latin America. Finding suitable economies with which to compare the Soviet Union or China is hard. But it is not impossible, and certainly ought not for that reason to be rejected with respect to the many more numerous situations in which we are dealing with merchandise from countries for whom surrogates can be found with relative ease.

Criticism of the rule has also focused on the alleged difficulty petitioners would have in stating an adequate case of dumping if they were compelled to develop the imagined costs of an Eastern European producer and then to "price" those costs in some undetermined third country. In fact, I suggest that the petitioner has, in some respects, an easier time in attempting to establish sales at less than fair value in such cases than in situations in which he must seek price data on foreign home market transactions. A projection of his own costs and factor inputs, suitably adjusted for the foreign locale from published information, is precisely what the existing Commerce Department regulation (19 CFR § 353.36(a)(7)) contemplates for such cases. It ought not to be more difficult to apply in the case of Polish wares than in the case of Swiss or French merchandise.

A third criticism of the rule stems from fears that the records of producers in state-controlled economies will either be unavailable for inspection by U.S. Government verifiers or will be unreliable even if examined. To the extent a producer (or its government) declines to permit access, the law and regulations have an ample answer: the "best evidence rule." The situation is no different than any other in which cooperation from respondents is not forthcoming. With respect to reliability, one must await actual experience. However, it can be said that in the two cases in which the input records of the state-controlled economy producers were meticulously reviewed by Treasury and Commerce personnel—Golf Carts from Poland and Montan Wax from the German Democratic Republic—the records were found to be more than adequate.

A fourth objection suggests that since the state-controlled economy may attempt to foster one type of production rather than another, it may "unfairly" be able to demonstrate real comparative advantage in the favored industry. But why is this unfair? Our entire trading system is supposed to be based on comparative advantage. We should encourage it. It is sensible for the Hondurans to grow bananas, just as it is unreasonable for Icelanders to try to do so. Similarly, if Poland has coal resources, it should mine and export coal. If Hungary has a technological base in electric light bulb manufacture, it should exploit that advantage. Only to the extent that the Hungarian producers are, in effect, growing bananas on the ice cap in a hot house subsidized by the government should we complain. But then there is ample scope in the administration of our existing law (even without the use of the countervailing duties law) to find margins of dumping, since obviously, their labor or material costs will be excessive. If, however they do have a comparative advantage, why should American consumers be denied the ability to buy their goods? If there is any "unfairness" it is to our own people.

This latter criticism of the constructed value rule assumes that export industries in state-controlled economies are often "targeted" for stimulus and support. Senator Heinz has suggested this is a fact. Of course, to some extent all economies—including our own—that buy at least some goods abroad, must export in order to earn the funds with which to buy what they need. And all of us are encouraging exports to some degree. But it is very hard to prove (rather than conjecture) that the economies of scarcity that characterize most of the countries we call "state-controlled economies," are particularly or effectively pushing their export industries in other than those fields in which they do have some comparative advantages. The Polish producers of hams, for example, whom I happen to represent, have been shipping their products to this country in volume since before World War II. It was as sensible an economic judgment that this was a good market for their products in 1930 as it is in 1980. Golf carts were made specifically for this market—just as there is specific merchandise made here for unique foreign markets. But those carts were (and are) made in a factory that, apparently, can stamp, paint and assemble the sheet metal involved with relatively low inputs of material, labor and energy. That is not "unfair" or "artificial" pricing.

Finally, the rule is criticized as too hard to administer. There may be situations in which the search for input factors becomes too difficult or in which the foreign producer or its government declines to provide the timely access needed by our administrators. But, if so, the other prong of the GAO recommendation also makes sense. That rule suggests finding for "fair value" the average price of the lowest cost free market supplier to the U.S. market, whether foreign or domestic. Clearly, if ascertainable, that price would be a convenient bench mark for exporters in, say, Poland, to follow. That is the standard this bill also proposes—but exclusively. We support its adoption, as long as the exporter has the option to try and prove a lower "simulated constructed value." Unfortunately, I do not have much confidence that it will be easy to find the lowest average price, and that is why I find the proposed legislation troubling in its exclusive reliance on this principle.

To the extent that merchandise is truly fungible—the way bulk chemicals or other commodities may be—the rule may well be workable. But even with respect to such goods, there are differences in grade, packing, terms of delivery, length of contract and the like that may make direct price comparisons with imported merchandise difficult—at least without making a number of what inevitably become arbitrary adjustments. But as one deals with more fabricated and differentiated merchandise, the notion that one can find the "lowest average price" in the U.S. market becomes virtually impossible. One might find ranges of prices describing classes of roughly similar goods. But even with respect to a canned ham, there are differences in quality—of water content, of fat, of the "taste" based on the solution in which it was cured or the food eaten by the swine from which it was made—that affect price. And with manufactured items there are often non-functional differences in appearance and style, in warranty and after-sale service terms, in delivery times and spare part availability, just to name a few, that makes the contemplated "to-the-penny" comparisons untenable.

There is also a small question of fairness. The rule allowing exporters from state-controlled economies to use the lowest U.S. price may be seen as giving those producers an unfair advantage that sellers in free market economies lack. But I do not find the rule objectionable on that basis. It rests on notions this Committee has, in connection with the antidumping amendments in the Trade Act of 1974, recognized as proper. It is based on the view that foreign merchandise priced above goods available in this market that are not being dumped or subsidized cannot, as a rule, be seen as a cause of injury to the U.S. industry. Nevertheless, it might be appropriate for this Committee to consider amending the statute generally so as expressly to permit exporters from *all* countries to demonstrate that they are not dumping within the meaning of the law by submitting proof that reasonable quantities of such or similar merchandise are available on the U.S. market at even lower prices.

CONCLUSION

My detailed discussions of some of the amendments to the TAA that may be proposed to you by the Administration are not intended to derogate from the comments made at the outset. Those are the views that I most sincerely urge upon the Committee. Do not rush to judgment. Do not once more succumb to the pressure and itch to "do something." As Congressman Frenzel is reported to have said "If you believe in free trade . . . it will be a good session if nothing passes in the 98th Congress." Instead, commission the serious study that has for so long been sorely needed but never undertaken. Focus the Nation's attention on the ways in which we can make more and sell more of what we make rather than on how we can even further limit the opportunities of others to sell their wares to us. That is the oversight the program needs and that only you can provide.

Senator DANFORTH. I understand the position of all three witnesses is that you don't like the bill. Mr. Merken doesn't think the existing law is so great, but he doesn't want us to rush into something new, and basically the other two witnesses are fairly satisfied with the existing situation. Is that right?

Mr. ROSEN. I shouldn't say "satisfied," Senator Danforth. I had the dubious distinction of having participated, with Mr. Greenwald on the other side, by the way, in two antidumping proceedings last year involving nonmarket economies. Neither result was very satisfactory to our clients. In fact, substantial dumping margins were found, perhaps even higher than would be found under the proposed standard.

I would associate myself with Mr. Ehrenhaft's remarks to the effect that a conceptually fair approach can be found in the factors of production technique. I think that is an approach with which Commerce as well as affected industries can work.

What I was trying to point out in my brief remarks was that we are deluding ourselves if we think there is certainty in the minimum allowable import price proposal.

If you are going to have a bright-line test, then importers or producers will be able to drive holes right through it and create cases showing dumping where there is no unfairness, or having a tremendous opportunity for imports by offering freight, delivery, advertising, et cetera, which don't count under that standard. Now, I don't know whether they count or not yet, but if they do count it is not going to be simple.

Mr. DOWNEY. I would like to make a comment, Senator, on your comment about Hungary. We appreciate your bright line that Hungary is a nonmarket economy. I am not so sure that that is the case. I think you may ask other witnesses in the next panel how they view it.

I mean, the Government, the Commerce Department, has made it very clear on a number of occasions that they are not sure. The test is not whether the country is a Communist country; that's the test for 406. But it is not the test under this provision. I think a fair argument is always possible in the case of Hungary, and perhaps some others, perhaps certain sectors of China, that in the individual case we are not dealing with a nonmarket economy. That is one of the problems with the present law, and to some extent with this present bill. There is no definition.

Senator DANFORTH. Mr. Ehrenhaft.

Mr. EHRENHAFT. The only additional comment, sir, that I wanted to make was that I think that the intent of this measure is in part to simplify the law, to provide an easier, quicker, more certain kind of remedy.

But as Mr. Rosen has pointed out, when we are comparing merchandise, it is almost impossible to do that in an easy, quick way if you are trying to be fair about it. You might be able to do it with bags of wheat off a shelf, some commodity that has standard specifications. As soon as one is dealing with a product that is more differentiated, whether it be light bulbs or golf carts, steel rods or glue, all cases that have in fact been before the Commerce Department in recent years, you immediately have differences in the merchandise that require comparability and adjustment.

And the other aspect, also, that Mr. Rosen pointed out with which I would like to associate myself is that products are rarely sold under identical terms of trade, at identical levels of trade and so on. Therefore, the notion that one can somehow find an average U.S. price, or a lowest U.S. price, and so on is, I think, an illusion. I don't think that it can be readily found, and therefore I don't think that it provides an appropriate standard for the legislation.

Senator **DANFORTH**. Senator Heinz, do you have any questions?

Senator **HEINZ**. No, Mr. Chairman, I don't.

Senator **DANFORTH**. Senator Mitchell indicated before he had to leave that he does have some questions which he would like to submit in writing, if that would be all right with you to answer them in writing.

Mr. **ROSEN**. I would be delighted to respond.

Senator **DANFORTH**. Thank you very much.

Next we have Mr. Ray Shockley, Mr. John Mangan, and Mr. Philip Potter.

STATEMENT OF W. RAY SHOCKLEY, EXECUTIVE VICE PRESIDENT, AMERICAN TEXTILE MANUFACTURERS INSTITUTE, WASHINGTON, DC

Mr. **SHOCKLEY**. Mr. Chairman, my name is Ray Shockley. I am the executive vice president of American Textile Manufacturers Institute, which is the central national trade association for the textile mill products industry in the United States. Our members manufacture some 80 to 90 percent of all the textile products made in this country.

I particularly would like to thank the chairman, Senator Heinz and Senator Mitchell for their persistent and consistent efforts in this trade area, across a broad range of subject matter.

We want to assure you of our desire to work constructively and cooperatively with you on this and other issues. Thank you very much.

Mr. Chairman, John Greenwald, who represented ATMI in our antidumping cases is with me today. Mr. Greenwald is an attorney with the firm of Wilmer, Cutler, and Pickering. In 1980 and 1981 he was Deputy Assistant Secretary of Commerce for Import Administration, and has considerable experience with the dumping laws in both Government service and the private sector. He is going to give details later on our experience with these and some possible alternatives.

We have seen imports from the People's Republic of China rise dramatically over the past few years from virtually nothing in 1978 to over 785 million square yard equivalents [SYE] in 1983. Now that 785 million square yard equivalent, had we manufactured that in this country, would have provided 75,000 jobs; or, if we in the United States had manufactured the entire 7.4 million SYE that came in here last year, we would have needed approximately 75,000 more jobs to have done it.

We have seen the U.S. textile markets disrupted because of imports flooding into the United States without apparent regard to market prices or the cost of production. On two occasions, member companies of ATMI have been forced to file antidumping cases in order to deal with disruptive imports from China.

In the course of these cases, we have gained some practical experience with the operation of the antidumping laws. In presenting our testimony today, we hope to give the committee a sense of, first, how the laws have worked for us, and second, how they might be improved.

Senator Heinz has long been aware of the problem with applying our unfair trade practice laws to nonmarket economies. And in S. 1351, he advocates replacing the surrogate country approach with an artificial pricing concept. We recognize that this concept would provide greater certainty and predictability in an antidumping case, and we welcome any attempt to replace the current system, which in fact is no more predictable than a roll of the dice in determining dumping margins on nonmarket economies.

At the same time, however, we also think it important to let the committee know that an artificial pricing rule which allows a country like the PRC to sell at the price of the lowest priced free-market supplier to the U.S. market, which creates serious problems for the U.S. industry, is difficult for us. Mr. Greenwald will have more to say about that.

We have also just been told by Mr. Olmer that the Commerce Department will not accept any more CUD cases from nonmarket countries.

At this point, if I may, Mr. Chairman, I would like to ask Mr. Greenwald to highlight his testimony.

[Mr. Shockley's prepared testimony follows:]

STATEMENT OF W. RAY SHOCKLEY, AMERICAN TEXTILE MANUFACTURERS INSTITUTE, ON NONMARKET ECONOMY IMPORTS LEGISLATION

My name is W. Ray Shockley, I am Excecutive Vice President of the American Textile Manufacturers Institute ("ATMI"). ATMI is the national trade association of the textile industry, representing about 80 percent of the domestic industry for the spinning, weaving, knitting, and finishing of cotton, wool, silk, and man-made fibers and 90 percent of the cotton system spindles.

Mr. Chairman, ATMI and its member companies have a major stake in the way that the antidumping laws are applied to imports from state-controlled economy countries. We have seen imports from the People's Republic of China rise dramatically over the past few years—from virtually nothing in 1978 to over 785 million square yard equivalents in 1983. We have seen U.S. textile markets disrupted because these imports flood into the United States without apparent regard to market prices or cost of production.

On two occasions, member companies of AMTI have been forced to file antidumping cases in order to deal with disruptive imports from the PRC. In the course of those cases, we have gained some practical experience with the operation of the antidumping laws. In presenting our testimony today, we hope to give the Committee a sense of (1) how the laws have worked for us and (2) how they might be improved.

Senator Heinz has long been aware of the problem with applying our unfair trade practice laws to non-market economies. In S. 1351 he advocates replacing the surrogate country approach with an "artificial pricing" concept. We recognize that this concept would provide greater certainty and predictability in an antidumping case and we welcome any attempt to replace the current system which in fact is no more predictable than a "roll of the dice" in determining dumping margins on NME's. At the same time, however, we also think it important to let the Committee know that an artificial pricing rule which allows a country like the PRC to sell at the price of the "lowest priced free market supplier" to the U.S. market would create serious problems for the U.S. textile industry. Let me explain.

Many textile products—for example greige printcloth—are commodity fabrics. They sell on the basis of price. Price differentials of less than a penny a yard are decisive. When a country like China enters the U.S. market with a large volume of very low priced goods, they drive down the market price for all suppliers. The price effect of the sales occurs before the imports come into the United States. It is at the time of order, not delivery of the goods, that the market price is set.

By the time the low priced Chinese imports enter the country, and a dumping case can be prepared, at least four months will have elasped since the dumping occurred. During that period, other foreign suppliers to this market, such as Thailand or Korea, will have dropped their own prices to meet the PRC competition. If dumping by the PRC is then judged by the prices at which Thailand or Korea sell to the U.S., the PRC will have been able to reduce its own dumping margin by driving down the prices of other suppliers to the United States.

Also we have just had a chance to review the Commerce Department's decision in the countervailing duty case against steel imports from Poland. In that case the Commerce Department found that U.S. countervailing duty law cannot apply to non-market economies.

This is a decision which effectively denies the application of U.S. law to non-market economies and has far reaching consequences. We urge the committee to reverse it. Unless the decision is reversed, the result will be that U.S. companies will have a remedy against illegal subsidies of market economy countries, but will have no remedy at all if the country is a communist country.

Mr. Chairman, John Greenwald, who represented ATMI in our antidumping cases, is with me today. Mr. Greenwald is now an attorney with the firm of Wilmer, Cutler & Pickering. In 1980 and 1981 he was Deputy Assistant Secretary of Commerce for Import Administratioin and so has had considerable experience with the dumping laws in both Government service and the private sector. He will give the details of ATMI's experience with the antidumping law.

Before turning to Mr. Greenwald, let me conclude my remarks by saying that the issue before the Committee is very important to ATMI. Imports of textile and apparels are at record levels. Imports far exceed non-disruptive levels. China and other non-market economy countries export large volumes to the United States across a broad range of textile and apparel product categories. There is a real question as to whether the textile import program of the United States is working properly. The industry may be left with no alternative but to take action under U.S. trade law. Any changes in our laws that would make it more difficult to successfully combat PRC dumping is of great concern to us.

Now I would like to ask Mr. Greenwald to comment on another alternative to the current approach to dumping by non-market economies and on the countervailing duty decision on Polish steel.

STATEMENT OF JOHN D. GREENWALD, ESQ., WILMER, CUTLER & PICKERING, WASHINGTON, DC

Mr. GREENWALD. Thank you, Mr. Chairman. I would like to speak briefly from the testimony but submit the full text for incorporation in the record.

I would like to focus on two points: The first is an area where the artificial pricing standard that is articulated in S. 1351 does, I believe, fall short. And second, I would like to comment briefly on last week's Commerce Department decision in the countervailing duty case on nonmarket economy countries.

I can understand the committee's frustration with the way in which dumping laws are applied to nonmarket economy countries. I think, as a practitioner, it is very difficult to advise a client that there is predictability and certainty in the result. It is, as Mr. Shockley said, something of a shoot of the dice.

But in one very important respect, the standard that is articulated in S. 1351 is likely to significantly lower dumping margins and significantly understate the margin of dumping by nonmarket economy countries.

The area where the probability is that the artificial pricing standard will lower dumping margins will be in any case in which the product involved is a price-sensitive, commodity-type product.

Let me, if you will, take you through two cases we had.

Senator DANFORTH. The problem is that Mr. Shockley was given 5 minutes. I didn't realize we were going to get a double-header here.

Mr. GREENWALD. Can I have 3 minutes; 2 minutes?

Senator **Danforth**. I am just a little bit concerned about the tendency of people to bring more than one witness up here.

Mr. **Shockley**. Mr. Chairman, I apologize; I thought that this was cleared because it was shown on the witness list. I apologize.

Senator **Danforth**. Two minutes.

Mr. **Greenwald**. Yes, sir.

In any commodity product that is price-sensitive, a low cost producer will drive market prices down. In a commodity fabric like print cloth, once China enters the market, Thailand or any other major supplier will have to reduce their prices to meet competition from the Chinese. It takes a good 6 months to prepare a dumping case and make sure that the injury case is strong enough to file. During that 6-month period, which is the period of investigation, the price from Thailand will be dropped to meet the Chinese price; the result of an artificial pricing standard in that sort of case is that you will have allowed the nonmarket economy country to effectively reduce its own dumping margin by the price impact of its dumping on other foreign suppliers.

The second point I would like to raise is on the countervailing duty decision by the Department of Commerce. I think this is a truly terrible decision. You have heard witnesses just before us talk about how prices do matter in countries like Hungary and the People's Republic of China.

Under Secretary Olmer appeared before you and said that domestic industry should not be overly concerned about the decision in the countervailing duty case, because after all they can bring cases under the antidumping law; yet, 2 minutes before that, in his own testimony, he drew your attention to the shortcomings of the dumping law.

What the Commerce Department has done is to remove a right of U.S. industry to act against nonmarket economy countries under the countervailing duty law without offering any satisfactory alternative.

Thank you.

[The prepared statement of Mr. Greenwald follows:]

STATEMENT OF JOHN D. GREENWALD, ON BEHALF OF THE AMERICAN TEXTILE MANUFACTURERS INSTITUTE

Mr. Chairman, my name is John Greenwald. I am a partner in the law firm of Wilmer, Cutler & Pickering. I very much appreciate the opportunity to testify on the application of the antidumping and countervailing duty laws to nonmarket economy countries ("NMEs").

Until mid-1981, I was responsible for administering the antidumping and countervailing duty laws at the Department of Commerce. Since leaving the Government, I have been involved in a number of trade cases, including two antidumping cases brought by the American Textile Manufacturers Institute against imports from the People's Republic of China.

The trade laws of the United States are, I believe, working far better under the administration of the Department of Commerce than was the case when the Treasury Department had the responsibility for conducting antidumping and countervailing duty investigations. However, a good deal remains to be done to improve both the laws and the way in which they are administered.

In reviewing the areas in which reform is needed, a good deal of attention has to be given to the treatment of NMEs. I understand the frustration with this aspect of the law—it seems a bit absurd to send a Commerce Department investigator to Thailand to examine Thai producer export prices to countries other than the United States in order to determine the "fair value" of Chinese printcloth sales to the

United States. However, nobody has yet developed an alternative approach without, at the same time, creating new problems.

This does not mean that there is no room for improvement in the way in which nonmarket economy country dumping is determined. But I believe that before any changes are made, the Committee must carefully consider the practical consequences of what is being done. Specifically, I think that a standard under which dumping of a product by an NME is determined on the basis of the selling price of exports to the U.S. market of the same product from the "lowest priced free market economy exporting country" raises serious potential problems. I think that most domestic industries seeking relief from nonmarket economy country dumping would fare more poorly under this standard than under current practice. The problems become most acute when a commodity type product is involved.

Let me illustrate with some actual case history. The two textile cases brought against the PRC involved printcloth and shop towels. In both cases, the PRC began to export to the United States in 1979. By 1982, the Chinese had become the dominant foreign supplier of the U.S. market for both products (accounting for 62 percent of total printcloth imports and nearly 90 percent of total shop towel imports).

A U.S. industry must wait until it has a strong injury case before it can file an antidumping petition. Thus, by the time a petition can be filed, the nonmarket economy country will have had more than ample opportunity to depress U.S. market prices generally. In both the printcloth and shop towel cases, the effect of PRC dumping was to drive down the prices of other foreign suppliers or force them from the market.

If, in either case, dumping had been decided on the basis of the lowest price of "free market" suppliers to the U.S. market, the dumping margins would have been significantly reduced. During the period of investigation, Thai printcloth producers and Pakistani shop towel producers had dropped their prices to the United States in order to meet Chinese competition. If fair value for the PRC were to be determined on the basis of these lower Thai or Pakistani prices, the PRC would have been permitted to reduce its dumping margin as a result of the impact of its dumping on other suppliers to the U.S. market.

The problem is not an isolated one. In a case involving virtually any price sensitive product, a major low-priced foreign supplier, whether an NME or not, will drive down the prices of all other suppliers to the U.S. market. This will occur whether textiles, chemicals, agricultural or other products are involved.

In addition to the basic problem outlined above, the "lowest priced free market supplier" standard raises problems because: (1) The "lowest priced" free market country supplier may itself be dumping on the U.S. market, or (2) that supplier's export price may be subsidized.

Unless there is a full investigation of the pricing practices of, and government support programs benefitting, the "lowest priced free market" supplier, there is no way of knowing whether that supplier's pricing is a reasonable measure of "fair value" for a nonmarket economy country subject to an investigation. Clearly, the Committee would not want to base a determination of dumping by a nonmarket economy country upon prices that reflect that "unfair" trade practices of another country.

I do not know whether these sorts of practical problems can be resolved by, for example, including U.S. producer prices in an artificial pricing approach to nonmarket economy country dumping. It might help, but even using U.S. producer prices will permit nonmarket economy dumping where the U.S. industry is more efficient than the industry in the nonmarket economy country.

As an alternative, I would suggest that the Committee consider the possibility of a "constructed value" approach to nonmarket economy country dumping under which "fair value" would be calculated on the basis of (1) the actual factors of production (e.g., units of raw materials, energy, labor) used by the NME producer, priced according to pricing information (including publicly available data) in a suitable "surrogate" free market economy country and (2) a statutory minimum for selling and administrative expenses and profits. This approach conforms to current practice used in certain nonmarket economy cases with one major difference.

At present, the Commerce Department feels it must get the consent of the government of, and the cooperation of producers in, the "surrogate" free market economy country. The producers in the surrogate country are then given elaborate questionnaires to complete. Not surprisingly, cooperation is often difficult to secure. The surrogate country selected, and its producers, have at most an indirect interest in the antidumping investigation against the NME.

The process of gathering information of surrogate country prices and costs could be greatly simplified if the Department were willing to rely on publicly available data on surrogate country prices. The World Bank, the IMF, Government publications and private source material all provide a wealth of information that can serve as the basis for pricing factors of production used in a nonmarket economy country. If the Department were willing to use this sort of data, it would remove a good portion of the problems now faced in having to secure "surrogate country" cooperation in a dumping investigation.

In order to make such a system work, the Department of Commerce would need to ensure that the nonmarket economy country provides accurate and current information on its factors of production. This can be done by use of the "best evidence" rule—i.e., if the nonmarket economy country does not supply adequate data in a timely manner, the petitioner's dumping allegations would be accepted.

A better framework for analyzing nonmarket economy country dumping would clearly improve the operation of the antidumping law. However, I believe that the problems with the trade laws and NMEs are even more significant in the countervailing duty area. In a recent decision—a truly terrible decision—involving steel wire rod from Poland and Czechoslovakia, Commerce determined that the countervailing duty law does not apply to nonmarket economy countries because it is impossible for the Department to identify a subsidy if an entire economy is state controlled. This decision is not even remotely justified by the language of the law, the policy behind it, or sound economic analysis. It was taken only for reasons of foreign policy convenience.

There is no basis for the conclusion that export incentives cannot be found and calculated in a nonmarket economy country. When the Poles, the Czechs, or the Chinese develop an incentive system for the express purpose of stimulating their export sales, the subsidy analysis is not fundamentally different from analysis when a free market economy country is involved. The point of departure in either case is the prevailing general system of rules and regulations.

The Commerce Department decision was based on the notion that since the economy of an NME is centrally planned, prices have no meaning, and therefore a subsidy could not exist. The conclusion on the significance of NME pricing is wrong, but that is almost beside the point. The pricing rationale misconstrues the nature of the countervailing duty law. The antidumping law is concerned with the reasonableness of pricing—i.e., fair value. The countervailing duty law is not. A countervailable subsidy will exist whenever a country creates a "special" incentive to export—i.e., gives its exporters something of value—that, given the general system of economic regulation within the country, is not "generally available" to all enterprises.

Developing countries with mixed economies have tried to justiffy their export subsidies by claiming that the subsidies do no more than offset the disadvantages imposed on their producers as a result of internal government regulation. The Commerce Department has, quite properly, rejected these contentions. The rationale has been that a country cannot use the disadvantages to exporters created by its internal economic policy, even if that policy is "irrational" in an economic sense, to "offset" the incentives it grants its exporters. By the same logic, the Department of Commerce cannot refuse to apply the U.S. law to an NME simply because the degree distorting internal economic regulation is greater than it is in the case of the country with the mixed economy.

Finally, as mentioned above, Commerce is flat wrong in its assertions that prices have no meaning in an NME. There is a wealth of economic literature which documents the degree to which East European and Chinese economic systems use financial and other incentives to promote exports. This is done within a system of central planning, but the existence of the central planning system does not mean the special export incentives are meaningless.

If the Committee reads the Department of Commerce decision carefully, it will find virtually no factual support for the conclusions reached. Commerce never justifies the basis for the decision with economic analyses, nor does it explain the contradiction between the decision and past Commerce precedent. If the Committee is interested in an area in which Commerce truly needs better legislative guidance, this recent decision on the non-application of the countervailing duty law to nonmarket countries provides it.

STATEMENT OF JOHN J. MANGAN, GENERAL ATTORNEY, UNITED STATES STEEL CORP.

Mr. MANGAN. Thank you, Mr. Chairman and Senator Heinz.

My name is John Mangan. I am general attorney, international trade, for United States Steel Corp. However, I appear here this afternoon on behalf of the American Iron & Steel Institute.

The issue of unfairly priced imports from nonmarket economies is one of growing importance to the steel industry. It is a complex issue and one which I have personally wrestled with over a number of years, most recently in the context of an antidumping case against Romania.

In that instance, United States Steel filed a dumping petition in January of 1982. During the course of the investigation a number of potential surrogates refused to cooperate with the Department of Commerce. As a consequence, the surrogate ultimately selected was not one that had been identified by either the petitioner, the other domestic parties, the respondent, or indeed the Department of Commerce, as being in the group of most suitable surrogates.

Yet, despite these problems, that case did lead to a suspension agreement based on Romanian price undertaking which at least until this time has proved effective.

The American Iron and Steel Institute views the current surrogate approach to dumping involving NME's as seriously deficient, primarily because of the unpredictability and the uncertainty involved. As a result, there is a swell of support within the membership of the AISI in support of a new fair market test that would provide more certainty, more predictability, that would be fairer and provide less digression.

The most promising proposal that has been aired to date is clearly S. 1351, which encompasses the artificial pricing concept. And the extent that artificial pricing could be an improvement over current law, we submit would depend mainly on the pricing standard actually adopted.

As you know very well, the artificial pricing standard in S. 1351 is the lowest average free-market producer price. Inherent in that concept is the idea that the nonmarket economy countries are among the most efficient in the world. Now, there is nothing that we have seen in our economic and legal research that would lead us to that conclusion; quite to the contrary, the bulk of information that we have seen suggests that they are among the least efficient.

Given our past experience with the trigger price mechanism, we fear that the lowest free market concept could end up providing our industry with potentially less protection than does the existing law.

The Commerce Department's recent determination that the countervailing duty statute does not apply to NME's makes it even more imperative today than ever that whatever concept is chosen be rational and equitable to all.

In the view of the AISI, the most equitable and rational proposal would be one based on the average weighted prices of free market producers selling in the United States.

I see the yellow light. For the remaining points I will rely on my written statement, subject to any questions from you.

Thank you.

[Mr. Mangan's prepared statement follows:]

SUMMARY POINTS FROM ORAL STATEMENT OF JOHN J. MANGAN, GENERAL ATTORNEY/INTERNATIONAL TRADE, UNITED STATES STEEL CORP., ON BEHALF OF THE AMERICAN IRON & STEEL INSTITUTE

The problem of non-market economy (NME) imports is an issue of growing importance to the steel industry.

Domestic steel producers have had mixed experiences using current trade laws to deal with NME unfair trade.

The AISI sees many problems with the existing AD law's "surrogate" country procedure, and we now have the additional problem of the Commerce Department having just ruled that CVD law does not apply to NMEs.

We believe that artificial pricing can be made to work effectively for domestic industries, the Commerce Department and the NMEs.

Senator Heinz deserves the thanks of all of us for creating a concept that offers the possibility for a significant improvement in the way we deal with unfair trade practices by NMEs.

The extent to which artificial pricing could be an improvement over existing law depends chiefly on the pricing standard chosen.

The "lowest average" free market producer price would be less preferable from our standpoint than current law.

The most rational and equitable artificial pricing standard would be the weighted average of free market producer prices in the U.S. market.

By inserting the weighted average U.S. pricing standard; excluding dumped and subsidized prices from that standard; extending the injury test only to NMEs which are GATT members and have signed the relevant GATT Codes; dropping the two-track approach; and providing for a two-year sunset/study provision, the Subcommittee will ensure that artificial pricing does in fact become a clear improvement over existing law.

Thank you, Mr. Chairman. I am John J. Mangan, General Attorney/International Trade for the United States Steel Corporation. Today I am testifying on behalf of the American Iron and Steel Institute (AISI), whose members include 56 domestic companies accounting for about 86 percent of the raw steel produced in the United States.

AISI appreciates this opportunity to testify before you on the problem of unfairly priced imports from non-market economy (NME) countries, because this is an issue of growing importance to the steel industry. In analyzing this issue, we have not just looked at aggregate figures or medium-term data. The problem as we have experienced it is one of import surges from particular NMEs, at particular times and in particular product categories. In 1981, for example, U.S. imports of steel from Romania increased by 434 percent from the year before, largely due to the 580 percent rise in imported tonnage of plate (see attachments).

This then is a complicated issue. For our part, we have studied it seriously for nearly three years, and there still do not appear to be any perfect solutions. We therefore welcome this hearing and applaud Senator Heinz and this Subcommittee for seeking to address this problem in a thorough and timely manner before it becomes unmanageable for domestic industries, the Commerce Department and U.S. foreign policy alike.

As far as U.S. trade laws are concerned, the key problem is that costs and prices do not have the usual meaning for non-market economy countries. Current antidumping (AD) law recognizes this problem by authorizing the Commerce Department to choose a non-state-controlled economy (or "surrogate" free market economy country) at a "comparable stage of development" to obtain prices or constructed value for determining dumping by NMEs. Current countervailing duty (CVD) law has no separate procedures for dealing with subsidized imports from NMEs, but thus far Commerce has been reluctant to apply the CVD law to NMEs.

In recent years American steel producers have had mixed experiences using the trade laws to deal with the NME unfair trade problem. For example:

In January 1982, United States Steel filed an AD case against carbon plate from Romania. In that case, five different countries refused to cooperate as surrogates and, as a consequence, the surrogate eventually chosen was one not originally advocated by any of the domestic parties—nor by the respondent—nor was it among the group of countries which Commerce itself identified as the "most appropriate surrogates". Nevertheless, despite all these problems, the case led to a suspension agreement based on a Romanian price undertaking which thus far has proved effective.

In November 1983, a group of domestic wire rod producers filed CVD cases against Poland and Czechoslovakia. In those cases, Commerce issued preliminary negative determinations that NMEs "are not exempt per se from the countervailing duty law", but in May 1 final determinations ruled that CVD law does not apply to NMEs.

Domestic steel producers view the current surrogate approach to dumping by NMEs as seriously deficient in at least three ways. First, it provides no certainty or predictability, either for domestic industries or for NMEs. Neither can ever know which free market country Commerce will choose as a surrogate for determining foreign market value. Second, in a period of widespread dumping as exists presently in steel, higher cost free market producers are generally reluctant to cooperate with the Commerce Department for fear that dumping suits will be brought against them. As a result, usually only those free market producers with the lowest costs and prices are willing to serve as surrogates. Finally, there is an inherent vagueness in the surrogate procedure concept of a country at a "comparable stage of development", and this casts doubt on the economic validity of any fair value analysis using this approach.

Given these problems, there is substantial support in the steel industry for replacing the current surrogate procedure with an NME fair value test that would be more certain, more predictable, more fair and less discretionary. The most promising proposal so far is "artificial pricing"—the concept around which Senator Heinz's bill (S. 1351) is based. Artificial pricing is simply a method to measure NME fair value by a standard called the "minimum allowable import price", which is based on sales by free market economy producers in the U.S. market.

Artificial pricing appears to have three major advantages. First, the replacement of the current surrogate approach by an artificial pricing standard could privide both domestic industries and non-market economies with more certainty and predictability as to whether dumping is in fact going on. Second, an artificial pricing mechanism could be easier for the Commerce Department to administer than the current surrogate procedure. And third, it could be more fair for petitioners and for NMEs—depending on how it is constructed.

The extent to which artificial pricing could be an improvement over current law would depend mainly on the pricing standard chosen. The artificial pricing standard in S. 1351 is the "lowest average free market producer price", which as we understand it would be the average price in the U.S. market of the lowest priced free market producer. At a hearing in January 1982, the Subcommittee Chairman raised concerns about this pricing standard, because it would allow Polish widgets costing $1,000 to produce to be sold fairly in the U.S. market at the Japanese price of $100 per widget. Given our own past experience with the TPM for steel, which acted as a "safe harbor" for dumping by most foreign producers, we share Senator Danforth's concerns. In fact, from a business standpoint, the lowest free market pricing standard could end up providing our industry with potentially less protection against NME unfair trading practices than does existing law.

The main rationale for artificial pricing is that one never really knows whether an NME is dumping because one is never really certain what the NME's true costs are. If that is so, it makes no sense, either in terms of economics or to equity, to assume the NMEs are generally as efficient as the lowest cost free market producers. On the contrary. In general and fundamentally, an NME producer is less efficient than U.S. and other free market producers. The lowest free market pricing standard would permit a safe harbor for dumping by assuming a level of NME cost efficiency which is very unlikely to exist. In addition, (1) it would be particularly disadvantageous to producers of capital-intensive industries such as steel; (2) it could lead to a "meeting competition" defense for foreign market-economy producers intent on supplying the U.S. market with their dumped or subsidized imports; and (3) it would grant NMEs a lower pricing standard than that afforded to certain market suppliers (including many developing countries) whose costs or prices might be higher than those of the lowest free market producer.

When Senator Heinz reintroduced his bill in May of last year, he noted that he had "not yet finally decided" on which artificial pricing standard was preferable and was "leaving it to the Finance Committee to make the judgment on the final standard". In making that judgment, the Subcommittee should consider the fact that the more the artificial pricing standard departs from the average U.S. producer price, the greater the likelihood it will be injurious to domestic industries. The Department of Commerce's recent determination that CVD law does not apply to NMEs means that it is now more vital than ever that whatever pricing standard is chosen be rational and equitable.

In our view, the most rational and equitable artificial pricing standard would be the weighted average (by volume) of free market producer prices in the U.S. market—and adjusted to exclude U.S. sales by foreign producers where there is a "reasonable indication" that they are being made at dumped or subsidized prices.

While some in the steel industry believe that even this pricing standard could give NMEs an unfair competitive advantage, such a pricing standard would at least minimize the risk that will occur. We also recognize that legitimate questions remain about how prices in any artificial pricing standard would be determined, but the determination of a weighted average U.S. price would be no less administratively feasible than would the lowest average free market producer price. We therefore strongly urge that the Subcommittee amend S. 1351 by changing the lowest average free market price to the weighted average U.S. price as the "minimum allowable import price".

If artificial pricing is to be a real improvement over current procedures—and we believe it can—the advantages offered by a more certain and predictable standard must not be at the expense of further injury suffered by domestic industries due to unfair trade practices by NMEs. Therefore, in addition to changing the pricing standard, the Subcommittee should ensure that the injury test in artificial pricing investigations is extended only to those NMEs which are GATT members and have signed the relevant GATT Codes.

Our major concern here is that extending the injury test to all artificial pricing investigations involving GATT members—as S. 1351 would do—could include cases where the chief allegation is one of subsidization but where the respondent NME country is not a signatory to the Subsidies Code (although a recent Commerce Department ruling, which is subject to appeal, held that the U.S. CVD law could not be applied to NMEs). We oppose such an extension because it would (1) be contrary to Congressional intent in the 1979 Trade Agreements Act; (2) be contrary to present U.S. policy regarding adherence to the Subsidies Code; (3) provide benefits to NMEs which are not automatically provided to market economies; and (4) defeat one of the original purposes of the bill, the creation of a "carrot and stick" approach in which the injury test is granted "where appropriate" when the data warrants it, but is refused (in artificial pricing investigations) when it does not.

A third area of concern is the section which would allow change from an artificial pricing investigation to an AD or CVD investigation and vice versa, depending upon whether the NME can provide "sufficient and verifiable" information on costs and prices to indicate the existence of "market oriented sectors". We urge that the Subcommittee drop this section because it is (1) unnecessary; (2) a contradiction in terms (can an NME have "market oriented sectors"?); (3) excessively discretionary (what is "sufficient and verifiable" information?); and (4) likely to lead to proceedings that are too complex, too long and too expensive.

At the same time, we understand the aim of this section, which is to encourage NMEs to move in the direction of more market oriented economies, and we accept the proposition that in the rarest of cases a NME might be more efficient than the artificial pricing standard would indicate. We therefore suggest that, rather than using a two-track approach to artificial pricing, the NME be given the right to appeal an artificial pricing determination. In such a situation, however, the burden of proof should be on the NME to show that it is indeed a more cost efficient producer—and the statute should provide clear standards for making that determination.

Finally, we think that any artificial pricing bill must include a two-year "sunset" and study provision. There is obviously a need for further study of the NME unfair trade issue by all concerned—by Congress, the Administration, independent agencies and the private sector. Domestic steel producers plan to continue to study the issue, both through the AISI and in conjunction with the textile industry and others in the TRAC (the Trade Reform Action Coalition). The Subcommittee should do likewise by requiring that S. 1351 include a two-year sunset and study provision which would (1) monitor NME import price and volume data: (2) provide for a thorough analysis of the effects of actual artificial pricing cases; and (3) study all reasonable alternative approaches. At the end of that two-year period, the artificial pricing system should become permanent unless the Congress, following consideration of relevant studies, determines that domestic producers have been clearly disadvantaged by the system.

We would summarize our views as follows:

The problem of non-market economy (NME) imports is an issue of growing importance to the steel industry.

Domestic steel producers have had mixed experiences using current trade laws to deal with NME unfair trade.

The AISI sees many problems with existing AD law, and we now have the additional problem of the Commerce Department having just ruled that CVD law does not apply to NMEs.

We believe that artificial pricing can be made to work effectively for domestic industries, the Commerce Department and the NMEs.

Senator Heinz deserves the thanks of all of us for creating a concept that offers the possibility for a significant improvement in the way we deal with unfair trade practices by NMEs.

The extent to which artificial pricing could be an improvement over existing law depends chiefly on the pricing standard chosen.

The "lowest average" free market producer price would be less preferable from our standpoint than current law.

The most rational and equitable artificial pricing standard would be the weighted average of free market producer prices in the U.S. market.

By inserting the weighted average U.S. pricing standard; excluding dumped and subsidized prices from that standard; extending the injury test only to NMEs which are GATT members and have signed the relevant GATT Codes; dropping the two-track approach; and providing for a two-year sunset/study provision, the Subcommittee will ensure that artificial pricing does in fact become a clear improvement over existing law.

U.S. IMPORTS OF STEEL MILL PRODUCTS FROM NME COUNTRIES

[Net tons]

Country	Imports 1979	Imports 1980	Percent change 1979–80	Imports 1981	Percent change 1980–81	Imports 1982	Percent change 1981–82	Imports 1983	Percent change 1982–83	Imports 2 months 1984	Imports 1984 annualized	Percent change 1983–84 (ann.)	Percent change 1979–83	Percent change 1979–84 (ann.)
Czechoslovakia	12,768	9,538	−25.30	14,689	54.01	10,437	−28.95	19,150	83.48	6,672	40,032	109.04	49.98	213.53
German Democratic Republic	136	43	−68.38	76	76.74	1	−98.68	13,266	1326500.00	8,360	50,160	278.11	9654.41	36782.35
Hungary		45		513	1040.00	6,741	1214.04	2,047	−69.63	215	1,290	−36.98		
Poland	117,121	119,498	2.03	167,498	40.17	42,253	−74.77	77,242	82.81	9,309	55,854	−27.69	−34.05	−52.31
Romania	38,555	57,581	49.35	307,364	433.79	36,730	−88.05	9,426	−74.34	7,916	47,496	403.88	−75.55	23.19
Yugoslavia	12,188	10,759	−11.72	18,181	68.98	15,953	−12.25	15,728	−1.41	2,215	13,290	−15.50	29.04	9.04
Total (6)	180,768	197,464	9.24	508,321	157.42	112,115	−77.94	136,859	22.07	34,687	208,122	52.07	−24.29	15.13
Czechoslovakia—Total	12,768	9,538	−25.30	14,689	54.01	10,437	−28.95	19,150	83.48	6,672	40,032	109.04	49.98	213.53
Wire rod	8,561	1,886	−77.97	331	−82.45	2,246	578.55	18,992	745.59	5,574	33,444	76.10	121.84	290.66
Plate	23	24	4.35		−100.00			130			0	−100.00	465.22	−100.00
East Germany—Total	136	43	−68.38	76	76.44	1	−98.68	13,266	1326500.00	8,360	50,160	278.11	9654.41	36782.35
Wire rod								1,215		581	3,486	186.91		
Plate	40	23	−42.50	76	230.43		−100.00	6,728		2,760	16,560	146.14	16720.00	41300.00
Hungary—Total		45		513	1040.00	6,741	1214.04	2,047	−69.63	215	1,290	−36.98		
Wire rod											0			
Plate				321			−100.00				0			
Poland—Total	117,121	119,498	2.03	167,498	40.17	42,253	−74.77	77,242	82.81	9,309	55,854	−27.69	−34.05	−52.31
Wire rod						7,987		25,843	223.56		0	−100.00		
Plate	86,035	60,481	−29.70	106,896	76.74	18,834	−82.38	8,713	−53.74	586	3,516	−59.65	−89.87	−95.91
Romania—Total	38,555	57,581	49.35	307,364	433.79	36,730	−88.05	9,426	−74.34	7,916	47,496	403.88	−75.55	23.19
Wire rod											0			
Plate	15,093	35,361	134.29	240,280	579.51	3,539	−98.53		−100.00	55	330		−100.00	−97.81
Yugoslavia—Total	12,188	10,759	−11.72	18,181	68.98	15,953	−12.25	15,728	−1.41	2,215	13,290	−15.50	29.04	9.04
Wire rod											0			
Plate	47		−100.00								0		−100.00	−100.00
6 Countries														
Total	180,768	197,464	9.24	508,321	157.42	112,115	−77.94	136,859	22.07	34,687	208,122	52.07	−24.29	15.13
Wire rod	8,561	1,886	−77.97	331	−82.45	10,233	2991.54	46,050	350.01	6,155	36,930	−19.80	437.90	331.37
Plate	101,238	95,889	−5.28	347,573	262.47	22,373	−93.56	15,571	−30.40	3,401	20,406	31.05	−84.62	−79.84

Senator DANFORTH. Mr. Potter.

STATEMENT OF PHILIP H. POTTER, CHARLS E. WALKER ASSOCIATES, INC., WASHINGTON, DC, ON BEHALF OF THE AD HOC COMMITTEE OF DOMESTIC NITROGEN PRODUCERS

Mr. POTTER. Thank you.

I am Philip H. Potter, senior associate with Charls Walker Associates, representing the Ad Hoc Committee of Domestic Nitrogen Producers, who account for about 50 percent of the total U.S. ammonia production capacity in the United States.

This group brought the 406 cases against the Soviet Union ammonia imports in 1979 and 1980, and the CVD and 337 cases against Mexican ammonia imports in 1982.

In our testimony we address the problems that private U.S. producers face in competing with state-controlled producers which use central planning and an administered price system.

In our opinion, current U.S. trade law is simply inadequate to address enemy trade.

Ammonia is the source of fixed nitrogen worldwide. It's main use is that of a nitrogen fertilizer for farmers. Ammonia is sold as a commodity in a bid-asked market. Ammonia demand is not price sensitive, but based mainly on grain prices. However, like bulk commodities, a drop in demand or an increase in supply, however small, will cause a significant depressing effect on the price.

When excess capacity and over supply exist in the U.S. marketplace, market economics should act to force out the highest cost or least efficient producers. But current U.S. trade law does not assure this result.

The point is that the market cannot and does not act to restrain volume or timing of NME imports, nor does it establish a base price under which such imports cannot be sold even at a loss.

The central planning and administered price systems used by NME's emphasize volume of production over profit or return on investment. As a result, NME producers use marginal pricing, in other words setting the export price at or below the nearest competitor's price, to assure that their excess production is exported with the goal of obtaining much-needed hard foreign currency.

U.S. producers paying fair market value in a competitive marketplace cannot exclusively use marginal pricing.

The problem is that a drop in demand does not send an effective signal, an effective price signal, to NME producers to cut back production or exports to balance supply with demand, because they are not primarily concerned with production costs and profits.

Market-based producers constantly strive to achieve such a balance in order to assure a price sufficient to recover production costs and return on investment. The question is: How can we send that signal to NME's? The answer is to set a benchmark price like the artificial price standard, but the benchmark price should be a median price of a survey of market-based producers, including U.S. producers which compete directly with the NME exporter.

In addition, the benchmark price should be adjusted to allow a majority of those producers to recover all production costs over a reasonable period of time, including a reasonable return on investment in the normal course of trace. We elaborate on this adjustment standard in our testimony.

The artificial pricing remedy proposed in S. 1351, by itself, would not necessarily send an effective signal to NME's or ensure the survival of more efficient market-based producers.

Also, since it is based on the lowest average price, it would guarantee by law that NME's would obtain the most efficient producer price. If an NME believes it is more efficient and more competitive than the median benchmark price allows, it would have an incentive to prove it. We do not believe this is an either/or choice between a pricing remedy or a production cost factor test.

We believe any artificial pricing remedy, the benchmark price, should provide a clear incentive for NME's to provide actual production factors, not costs, to gain a more favored position in our markets. The ITA could then measure the individual factors of production—materials, capital, labor inputs—against prices for those inputs in world markets including the U.S. markets. This device would also eliminate the currency-conversion problems that currently exist.

We would like to close just by saying that we do strongly support the artificial pricing remedy, we strongly support the injury test requirements in the bill, and particularly the application of quantitative restraints in the NME cases.

Thank you.

Senator **Danforth**. Thank you.

[Mr. Potter's prepared statement follows:]

Summary of Testimony of Philip H. Potter, Charls E. Walker Associates

Mr. Chairman and members of the committee, I am Philip H. Potter, Senior Associate of Charls E. Walker Associates, Inc. I am testifying on behalf of the Ad Hoc Committee of Domestic Nitrogen Producers, a coalition of 10 companies which account for approximately one-half of U.S. domestic ammonia production.

We appreciate the opportunity to address the Committee concerning the problem faced by U.S. ammonia producers in relation to imports of ammonia and other nitrogen fertilizers from nonmarket economy nations (NME's). We believe that the NME trade problems which now concern domestic nitrogen producers will soon confront the entire U.S. petrochemical industry, in particular the bulk commodities like ethylene and methanol and their derivatives. We will limit our comments today to an analysis of NME trade problems related to chemicals, particularly commodity petrochemicals and ammonia. We will analyze the proposals to remedy those problems. The Ad Hoc Committee has submitted a written statement covering the subject in considerable detail.

BACKGROUND

The Ad Hoc Committee has gained considerable experience and information on cases filed against Soviet and Mexican ammonia imports from their totally state-controlled monopolies. This experience is specific with regard to Sections 406, 201, 337, countervailing duties and antidumping. In each and every case, U.S. ammonia producers found there would be no relief granted under existing U.S. law to remedy the injury to this industry.

The reason that no relief has been granted is that our trade law at present does not address the unique mismatch of our respective economic systems. While U.S. private producers are concerned with production costs and making profit, NME producers which export to our market are not constrained to a similar degree by market forces. Whereas U.S. producers must seek to balance production with anticipated demand, NME producers are more concerned with exporting all of their excess production—in order tro generate the hard foreign currency their economies need. Importantly, NME capital investment decisions and prices are administered by central planners, not determined by market forces. Market economy producers must have access to remedies that provide effective substitutes for the normal action of market forces, because there are no effective market restraints on the volume of export sales and prices by NME monopoly producers.

NATURE OF THE U.S. AMMONIA MARKETPLACE

Ammonia is produced from a hydrocarbon feedstock, usually natural gas, which is combined with air in a catalytic process. For market-based producers, natural gas accounts for about 75 percent of ammonia's direct production costs. Ammonia is traded like a commodity in a daily bid/ask market. It is a high volume, marginal profit item; a relatively small change in supply generates a much greater change in price.

The production of ammonia has become synonymous with the production of food. Ammonia is 82 percent nitrogen, and virtually the sole source of nitrogen fertilizer so important to U.S. farmers in the production of high-yield harvests of crops such as corn and wheat. It is currently estimated that 30-40 percent of all U.S. food production results from the application of fertilizers.

Over the last five years, all additions to the U.S. ammonia supply have come from the Soviet Union and Mexico. These imports have functioned to oversupply the U.S. market, driving down prices to below most U.S. producers' production costs. These imports were especially damaging to the U.S. industry during the weak demand of 1982-1983, which was caused by grain price problems and the PIK program. During that period, U.S. ammonia production fell by 30 percent and 13 percent of total capacity was permanently lost. But despite weak demand, imports increased by 10 percent. U.S. farmers must now rely on imports to supply over 20 percent of their nitrogen fertilizer requirements. Under current conditions, all future growth in U.S. demand must be met by imports.

Imports from NME countries are "marginally priced;" in order to assure that all excess production is exported, central planners in the NME set the price of their product at or below the nearest competitor's price in the export market. There is no true economic production cost basis to provide a floor below which they will not sell at a loss. In addition, they do not need to earn a profit or return on investment. Resulting market prices provide no signal to an NME to restrain the volume of its exports. As long as these dichotomies continue to occur, U.S. ammonia producers will continue to be forced to disinvest in plants. Market-based producers cannot compete against marginal prices, or set prices in such a manner. Export volume and price considerations made without regard to the U.S. market's requirements by NME exporters are the primary cause of U.S. market disruption.

INADEQUACY OF CURRENT U.S. TRADE LAWS

Section 406 requires that NME imports be "rapidly increasing" to be a significant cause of injury. This means that gradually-increasing imports under a countertrade deal, such as the Occidental Petroleum Company/Soviet Union countertrade, are not a significant cause of material injury or threat of material injury. But long-term intrusion of marginally priced imports disrupts the U.S. market and initiates a spiraling disinvestment process. Also, the "significant cause" requirement under Section 406 is a higher standard than required under either our antidumping or countervailing duty laws, though less than under Section 201, and is not appropriate. We believe that the surge requirement should be eliminated. Significant cause should be amended to reflect the same causal requirement as CVD and antidumping. The "threat of material injury" standard should be clarified to recognize that injury from NME imports may be gradual. Finally, Presidential discretion to deny a remedy should be limited to national defense or national security requirements. Otherwise, Section 406 should be repealed.

Also, we continue to believe that shifting Section 406 cases to Section 201 remedies unnecessarily politicizes trade disputes, and risks penalizing other market economy exporters who are trading fairly. Market-based exporters could be forced to sell under tariffs or orderly marketing agreements, or to compete for quotas; this could create GATT problems and result in possible violations of Most Favored Nation status. Injury level determinations under Section 201 have tended to concentrate on significant levels of market penetration. But by the time NME imports have reached a level judged to be "significant," the injury may already have occurred. Long-term depressed prices can initiate a disinvestment process in the U.S. market which cannot, in the case of ammonia, be easily reversed or remedied.

U.S. ammonia producers filed CVD and Section 337 cases against Mexico in 1982. In that context, the appropriateness of antidumping was also reviewed with the ITA. While Mexico, is not an NME, the production of ammonia and other basic petrochemcials in Mexico is conducted by the state energy monopoly, PEMEX. Production input prices are set under a government-administered price system, and home market prices are also administered. Ammonia export prices are set by the same marginal price approach used by NME's. Thus, some elements of the Mexican case are instructive on designing an NME remedy.

Mexican imports have avoided the imposition of CVD's to offset subsidization by PEMEX because the artificially-low price of natural gas administered by the government is "generally available" to any industry in Mexico—even though the administered price is below market value. Due to the lowering of production costs by administered prices for inputs, a constructed value analysis under antidumping yields a foreign market value in virtually all cases that is below the U.S. price.

In antidumping cases, the home market price is generally assumed to reflect the true costs of production. However, home market prices in NME's are usually inapplicable even if they can be determined. Sales to a third country are also generally inapplicable, since they reflect market conditions in the importing country, not the NME, due to marginal pricing practices. This leaves only the recourse of constructing a value in a surrogate country, which is arbitrary, administratively difficult and does not yield a fair result in many cases.

In conclusion, there is simply no current law adequate to deal with the trade problems arising from bulk commodity and chemical imports from the NME's.

PROPOSED REMEDIES

We support the *concept* of an artificial pricing remedy as a benchmark price in NME cases. The proposed benchmark price is more precise than the current surrogate country approach. It is not adequate in and of itself, however. We also support improved standards for termination and suspension of cases, and the authority added to allow settlement through quantitative restrictions. We believe such restrictions to be proper in NME cases. In some instances, quantitative restrictions may be the only way to resolve NME trade disputes.

However, concerning the method of establishing the benchmark price, we respectfully suggest that the artificial pricing standard should neither be the lowest nor the highest price in the market, but a price in between. The proposed benchmark price, the "lowest average price," could fail to provide the necessary remedy. No producer, much less an NME producer, should be guaranteed the "most efficient producer" price by law.

The fundamental criteria which should be used to determine the benchmark price is a price that allows a majority of market economy producers to recover all production costs within a reasonable period of time in the normal course of trade, including a reasonable return on investment. Such a price would be fair absent some showing by the NME exporter that it is entitled to a better price or more favorable treatment due to real production efficiency or comparative advantage.

In order to make the remedy workable, we suggest that the Committee consider coupling the benchmark or artificial price methodology with such a production cost-based methodology to replace the surrogate country test. The benchmark price should then be an incentive for NME's that consider their production to be competitive in market economy terms to supply specific and verifiable production cost factors. Those factors, divided into materials, capital and labor, would then be measured against world market values for the inputs where at all possible. Material inputs can be so measured, and current ITA practice already measures capital costs by such a standard in other cases. Labor should continue to be measured on a surrogate country basis. Administratively, such a process is less complex than current practice and yields a fairer result in market economy terms, since it directly accounts for NME efficiencies.

This approach will give NME exporters some market economy incentives to adjust sales volumes to meet current demand, in order to avoid causing market oversupply and price depression, i.e., "below cost sales." This would not require that there would be no periods when prices would fall below production costs and return on investment in the short term. Such price declines sometimes occur in market economies during highly competitive periods.

This methodology provides a reasonable fair price to an NME with the benchmark "artificial pricing" standard. In addition, it permits an NME to receive a more favorable price and treatment where it is willing to show its actual production efficiencies and advantages. It will, hopefully, provide an incentive for the NME to do some market research in those markets it wants to enter, including consideration of supply/demand factors at the time of its investment decision. This is what a market economy producer must do to have some assurance it can recover its investment in the normal course of trade.

I'll be glad to take your questions now.

Senator **Danforth**. Mr. Greenwald, I apologize to you. My witness list has you listed as accompanying Mr. Shockley, but after communication with my staff I find that arrangements were made for you to testify separately. Therefore, if you have any additional comments to make, we will be happy to hear them.

Mr. **Greenwald**. No, Mr. Chairman. I will just respond to questions.

Senator **Danforth**. Senator Heinz.

Senator **Heinz**. Yes, Mr. Chairman.

Let me start by asking Ray Shockley: Your concern is that S. 1351 is going to understate the costs of imports. If that's true—let's take that premise—will it do so, do you think, to a greater or a lesser degree than current law?

Mr. **Shockley**. I think it would to a greater degree, Senator. One of our biggest problems, for example, with China is a commodity fabric called print cloth. China comes into the market and offers print cloth at a price—and often a penny a yard will determine the price—and then everyone else in the market, let's just say Korea and Taiwan, comes in and meets that price. That happens before any goods are shipped at all out of those manufacturing countries into this one. It is at the time of the order and not at the time of delivery that the market price is set. So our problem with an averaging basis would simply be that the lower Chinese price in an industry as competitive as ours, would tend to drive down the price of all the other suppliers and reduce the dumping margin.

Senator **Heinz**. Well, I understand that you contend that this will be less good than current law, but do you have any calculations to demonstrate, to prove, that it will be less than current law, and can you submit them to us?

Mr. **Shockley**. We can, Senator.

Senator **Heinz**. All right. Now, as I understand what you want to do, you want to modify current law and construct the cost of production of a nonmarket economy out of publicly available information.

Mr. **Shockley**. Yes, sir.

Senator **Heinz**. We have heard a lot of discussion that that is just about impossible. Why do you think that that is possible, Mr. Greenwald?

Mr. **Greenwald**. The discussion lacked specific examples. People simply asserted that it is impossible. I doubt whether in many cases it is impossible.

Senator **Heinz**. Let's take Chinese print cloth.

Mr. **Greenwald**. There are published data. The point of departure has to be factors of production, the Chinese factors of production.

Senator **Heinz**. Yes.

Mr. **Greenwald**. How many man-hours, how many woman-hours, how much energy, how much yarn.

Senator **Heinz**. Well, there are a couple of things you left out.

Mr. **Greenwald**. Sure. This is an example. But you must get full and complete factors of production.

Senator HEINZ. How do you do that?

Mr. GREENWALD. You use your best-evidence rule. If the Chinese simply refuse, and in one case they came very close to refusing, the answer is a quick and sure application of the best-evidence rule by the Department of Commerce. In other words, the burden clearly must be on the nonmarket economy country to provide full and accurate information on its factors of production.

Once you do that, you can very easily calculate the price of yarn, you can calculate the price of cotton, there is a world price for energy, electricity. And there are published data readily available, to pick a surrogate country like Thailand, on Thai labor prices.

Senator HEINZ. In many industries the labor component can be a very key question. And why Thailand, compared to China?

Mr. GREENWALD. What you get from China are the factors: How many man-hours of labor is used to make a yard of print cloth. Then the role for the surrogate is in pricing those factors. So you would go to Thailand, assuming it is a suitable surrogate for the PRC, and there is published data available on Thai labor rates per hour. It is very detailed.

Senator HEINZ. You would use Thailand's labor costs instead of China's?

Mr. GREENWALD. The prices which China pays its workers wouldn't provide an adequate basis for asserting fair value. I would agree with other witnesses who say when it comes to pricing the factors of production you cannot use the nonmarket economy prices; but you can use the basic factors of production, that is, hours worked, and price them at a surrogate's prices.

Senator HEINZ. I am a little confused by that, because in China, whether we like their system or not, they pay a wage rate that doesn't reflect housing costs, medical costs. In Thailand I assume they pay a wage rate that does reflect that; they are a market-based economy. And yet I don't hear you taking those differences into account. And I don't know whether the Chinese pay, if you figure it all up, any wage at all.

Let me ask you this: What about the cost of capital? What would you do about interest rates? In the textile industry the cost of capital—at least if my previous conversations with Ray Shockley and others have anything to commend them—is quite important.

Mr. GREENWALD. It is quite easy to get data on the type of machinery used, and the——

Senator HEINZ. No, the cost of capital—interest rates.

Mr. GREENWALD. Yes. But you would work back. The calculation would have to be roughly along the following lines: Find the capital investment, and then you can quite easily, from there, figure out the financing costs necessary to carry that capital investment.

Senator HEINZ. Well, Would you use a Japanese interest rate, or an American interest rate?

Mr. GREENWALD. In a case like that, it would depend on the surrogate country selected. I would use, let's say, a Thai interest rate.

Senator HEINZ. You would use a Thai interest rate?

Mr. GREENWALD. Yes; if Thailand is the surrogate.

Senator HEINZ. I don't know why.

Well, I gather what you are really saying is, just toughen up the existing law a little bit. I am just not sure I understand how yours is that much different from existing law.

Mr. **Greenwald**. Senator Heinz, the biggest problem the Commerce Department faces in practice, as it goes around knocking on countries' doors and saying, "Will you be a surrogate" to a third country, is that the third country and its producers have no direct interest in the case, and by and large don't like the idea of participating.

Mr. Horlick cited five or six countries from which Commerce tried to get cooperation in the shop-towel case. What I am saying is, rather than go asking for cooperation from these countries, simply select a country—let the lawyers argue about what is the appropriate surrogate—and once you reach that point, work off publicly available data if the country in question will not provide data of its own.

Senator **Heinz**. But can't you do that now?

Mr. **Greenwald**. The Commerce Department will not do it.

Senator **Heinz**. But isn't that what existing law provides for?

Mr. **Greenwald**. It could be made to provide for that. Yes, it could. But it is not administered that way.

Senator **Heinz**. How would you change current law? Or would you just change Secretaries of Commerce? [Laughter.]

Mr. **Greenwald**. I think the easiest way of influencing a Secretary of Commerce's mind is to pass a law saying that it is perfectly permissible to use publicly available data in your calculations.

Senator **Heinz**. Well, I have probably taken my 5 minutes, but I have a couple of other questions.

Senator **Danforth**. Go right ahead.

Senator **Heinz**. All right.

One other point you made was about how prices under S. 1351 would kind of sink as imports came in, and that that was somehow a big concern of yours.

Now, I would just point out to you that that is the problem you have now with existing antidumping law, whether it is a nonmarket economy or not, and the answer to that is less an artificial pricing standard concept, but in beefing up the threat-of-injury provision which tends to get overlooked, which just happens to be a provision of the Trade Reform Action Coalition legislation that I know the textile industry is rather interested in.

Would you not agree that the way to solve that problem is to permit a more rapid determination based on threat of injury?

Mr. **Greenwald**. If you could have a change in the threat-of-injury standard, it would clearly help.

Senator **Heinz**. Yes.

Mr. **Greenwald**. But, in a practical sense, a businessman will not come in and explore seriously the possibility of an expensive dumping case unless he is hurting fairly badly.

There is the time lag between when a market is depressed, because when orders are taken and when the client walks in the door to inquire about a dumping case, and when a dumping case is prepared. By the time that time lapse has ended and you are ready to file a case, the other free market economy suppliers to the U.S. market will have reduced their price in any commodity item to a price that is equal to or only slightly above the price offered by the nonmarket economy country.

Under current law, you don't have that problem, because instead of looking at prices of a foreign country to the United States, you look at prices of that foreign country to a third market like, let's say, Europe.

Senator HEINZ. All right.

Mr. Mangan.

Mr. MANGAN. Yes, sir.

Senator HEINZ. Regarding your testimony, could you tell us approximately how much of the U.S. steel market is now accounted for by nonmarket economy steel imports?

Mr. MANGAN. Well, Senator Heinz, I think you would have to go through on almost a product-by-product basis, as the ITC does. Clearly, plate has been subjected to low-priced imports from NME's.

Senator HEINZ. The question was not whether they are being dumped or subsidized; the question is: How much of the market is nonmarket economy sourced? Any idea, roughly? One percent? Five percent?

Mr. MANGAN. It is rising. I couldn't give you a specific number. I would be glad to furnish that.

Senator HEINZ. All right. What I would like to get is the tonnage data, the market share of the countries, the products, the breakdown for all of that.

Let me ask you this: You made a point of stressing that nonmarket economies are not very efficient; indeed, you said they are very inefficient. How do we know that?

Mr. MANGAN. Senator Heinz, I think there have been a number of studies that all come to that conclusion. One that comes to mind, and I don't have the citation, is that in the Soviet Union there is roughly a 10-percent inefficiency imposed, a dead-weight inefficiency caused by the central planning feature of that economy.

There have been numerable——

Senator HEINZ. Are they steel exporters? The Soviet Union?

Mr. MANGAN. Not to the extent that Romania, East Germany, Czechoslovakia, and some of the others are.

Senator HEINZ. What do we know about the ones who are exporters?

Mr. MANGAN. I just might add that in the past they have exported iron and steel products, including pig iron, and there was a dumping order entered against them.

Senator HEINZ. Now, you would like a different price standard than exists in S. 1351. You do support the artificial pricing standard concept.

Mr. MANGAN. Yes, sir.

Senator HEINZ. Can you present any quantitative evidence showing how either your standard or that in S. 1351 would affect you in some real cases, and also do it for current law?

Mr. MANGAN. It would be difficult, for this reason: I think one would need to look at the effectiveness of the existing law in the cases that my client has brought. The most recent one was the one against Romania, where in 1981 the Romanians shipped a quarter of a million tons of plate into the United States. In late 1982 there was a suspension agreement entered, and in 1983 there were zero tons imported. So from that standpoint, under existing law it was totally effective.

The problem, the real problem with existing law as we perceive it, is the uncertainty and the unpredictability, not just in the original decision but, as you know, under the Trade Agreements Act of 1979 there is an annual review. So from one year to the next, you don't know where you are going to end up.

Senator HEINZ. Do you prefer S. 1351 to current law?

Mr. MANGAN. I would definitely prefer artificial pricing to current law.

Senator HEINZ. All right. And even if it's at the standard in S. 1351? I am not asking you to endorse that standard; I am asking you to choose between those two alternatives.

Mr. MANGAN. I might go with existing law on that, Senator.

Senator HEINZ. I beg your pardon? You might go with existing law?

Mr. MANGAN. Yes, sir.

Senator HEINZ. Well, you are likely to have it, if you are not careful. [Laughter.]

Do you want to try again? [Laughter.]

Mr. MANGAN. It's a wonderful concept.

Senator HEINZ. I sense a certain reluctance on the part of the witness to go further, Mr. Chairman.

Let me just ask this: Under your formulation, do you include U.S. producers in the weighted averages?

Mr. MANGAN. That is a point that we haven't specifically focused on in the written proposal, or I don't believe there has been much discussion even with respect to S. 1351 on that.

I think that it is a point that needs to be considered. I think there may be substantial merit in including the U.S. producers' price in there. I would like to give that some further thought.

Senator HEINZ. I don't know if my legislation as reintroduced this year is clear on the point, but our bill would not include producers that dump and subsidize, in determining who was the lowest average free-market producer. I gather yours also knocks out everyone who you think dumps or subsidizes.

Mr. MANGAN. That is correct.

Senator HEINZ. Who would be left in?

Mr. MANGAN. In steel, not very many.

Senator HEINZ. Anybody?

Mr. MANGAN. There are countries right now which have not been accused of dumping or subsidizing.

Senator HEINZ. Can you name more than two?

Mr. MANGAN. Yes; on certain products, Japan. Currently, there is an order on plate, but I am not aware on any other significant steel mill product.

There are undoubtedly some smaller countries, such as Taiwan. Again, there is an antidumping order outstanding on plate and on pipe and tube, but I think there are still a multitude of products where they haven't had complaints filed.

Senator HEINZ. You are saying that they are not generally dumping or subsidizing?

Mr. MANGAN. No; I am saying complaints have not yet been filed. They may still come.

Senator HEINZ. I gather, then, that the universe out there that does not dump or subsidize is pretty small and is restricted to Canada, Japan, and a few other tiny little instances. Is that right?

Mr. MANGAN. I am afraid, in the steel sector, that's true.

Senator HEINZ. Well, I hope you will go and get a comprehensive position from AISI on whether you prefer current law or S. 1351. It is not that I am adverse to trying to improve S. 1351, but we have had a lot of testimony here today that suggests that current law is awful and that there is a good deal more certainty in S. 1351 despite its imperfections. And we have the administration supporting S. 1351. I would hope that we could get a position from the AISI on the question I asked.

Mr. MANGAN. All I can say on that one is, even with respect to a weighted average standard there were considerable viewpoints expressed within the membership of the AISI, and there were a number who were reluctant even to advocate that standard.

But we will come back to you, Senator, with a more definitive position.

Senator HEINZ. All right.

Senator DANFORTH. Mr. Shockley and Mr. Greenwald, your position is that you oppose the bill, and you basically oppose any change from the existing situation, except that the method of computation of the surrogates' prices should be different. Is that right?

Mr. SHOCKLEY. Mr. Chairman, our big difficulty is with the commodity price situation. We are convinced that it is most important to do something possibly to change that, to accommodate this problem that is genuinely serious.

We are a very competitive industry domestically as well as overseas, and we are being most honest when we say that a penny or even a fraction of a penny can make the sale or change the market. So everything has to move very quickly on that. So it's a real problem for us.

Senator DANFORTH. And Mr. Mangan, you oppose the bill. You don't object to the idea of having a specific price, but you think that the artificial price system that is in the bill, the lowest average free-market price, is not the one that you would prefer.

Mr. MANGAN. Yes, Mr. Chairman; I haven't opposed the bill. In fact, as I indicated in my recap earlier, we think it is the best proposal that has been made by anybody to date.

Senator DANFORTH. But it is the method of computation that you disagree with?

Mr. MANGAN. Yes, sir.

Senator DANFORTH. And you would rather not have any bill than this method of computation?

Mr. MANGAN. Well, we will get back on that one.

Senator DANFORTH. Right.

And Mr. Potter, is your testimony basically the same as Mr. Mangan's?

Mr. POTTER. No; it is somewhat different. We support the artificial pricing remedy. We would make some adjustments in it. And we suggest also that you couple it with the ability to use it as an incentive. If the NME thought they had a more competitive price, if they thought they had production deficiencies, they have some incentive then to bring their production cost factors in—not their costs. We all agree you can't convert their costs, but you can get their production factors.

Senator **Danforth**. Would that create too much uncertainty, do you think, because of its complexity?

Mr. **Potter**. No. We don't think it creates any more uncertainty, because you have the first cut at the artificial pricing remedy; that's what you are after, to try to get a price, to try to get a fair price in the marketplace, one that reflects over the long term the recovery of production costs and a return on investment. That's the one adjustment we think needs to be made.

Then if the NME thinks they deserve a better place in the marketplace, it's incumbent on them to come in with those factors, and then you can compare them with world market values.

Senator **Danforth**. Let me ask each of you: Do you think that nonmarket economies would view this bill as a safe harbor for dumping?

Mr. **Greenwald**. I think, as a general proposition in the textile area, that the People's Republic of China would be better off with the bill passed than with the current law. So in that sense, yes.

Now, that answer is really limited to the commodity-type product.

Senator **Danforth**. Mr. Mangan, do you think that nonmarket economies would view the bill as a safe harbor for dumping?

Mr. **Mangan**. My own opinion is, yes, that they would.

Senator **Danforth**. Mr. Potter.

Mr. **Potter**. If the only standard is the lowest market price, it would be a safe harbor in the case of ammonia. It is a commodity problem. There is only one price. It doesn't matter whether you pick the median price or the highest price or the lowest price; it's the price. And the problem is the volumes, the cyclical changes in the marketplace that oversupply the market. So it would be a safe harbor for them if it were only the lowest price.

Senator **Danforth**. Gentlemen, again, Senator Mitchell can't be here for this panel, and he has indicated that he may want to submit some questions in writing for you, if it would be all right with you to answer them in writing.

Mr. **Greenwald**. Certainly, Senator.

Senator **Danforth**. Thank you very much.

[Whereupon, at 4:31 p.m., the hearing was concluded.]

[The following communications were made a part of the hearing record:]

SUBMITTED STATEMENT OF AMERICAN FEDERATION OF LABOR & CONGRESS OF INDUSTRIAL ORGANIZATIONS

The AFL-CIO appreciates the opportunity to comment on a major problem left unresolved during the Multilateral Trade Negotiations (MTN) of 1979—the issue of how to correct dumping and market disruption caused by such practices as countertrade and artificial pricing of articles produced by communist countries or other nonmarket economy countries. In this regard, S. 1351, a bill introduced by Senator Heinz to amend the 1974 Trade Act to provide a special remedy for the artificial pricing of articles produced by nonmarket economy countries, represents a useful vehicle to reopen debate and consideration of these problems. Unfortunately, the AFL-CIO believes that S. 1351 does not provide an adequate remedy for injurious imports from communist and other nonmarket systems.

Nonmarket trade has had a serious impact on the U.S. economy and on specific industries. Imports of light bulbs, golf carts, shoes, steel items, glass, textiles, and many other products have often come in at prices based on political considerations that undercut U.S. production.

Neither the size nor the impact of this trade is monitored by the government in accurate detail.

The 1974 Trade Act defines nonmarket economies (NME's) as those that are dominated or controlled by communism. It requires the U.S. International Trade Commission to monitor trade with certain NME's. At present, those listed for monitoring include: Albania, Bulgaria, Cuba, Czechoslovakia, East Germany, certain parts of Indochina, such as Vietnam, North Korea, the Kurile Islands, Latvia, Lithuania, Mongolia, Southern Sakhalin, Tanna Tuva, and the U.S.S.R. In addition, four communist countries receiving most-favored-nation (MFN) tariff treatment are also monitored: Hungary, China, Poland, and Romania. The U.S. has dropped Yugoslavia from that list. U.S. trade with nonmarket economies, however, is far more complex than a simple examination of artificial pricing practices by those countries would reveal. Countertrade deals, for example, are equally disruptive. These deals are a form of barter that do not fit into the modest protection afforded by existing trade laws and policies which are geared to market economies and a supposed "free trade" philosophy. This is because the foreign countries and companies pressuring for these agreements do not pretend to practice either "free trade" or to follow the underlying principles of a market economy.

The seriousness of these problems was pointed out to this Subcommittee in testimony by AFL-CIO President Lane Kirkland on July 13, 1981:

"The impact on U.S. trade of barter arrangements can be large. Pricing policies of the firms using barter and/or of a communist country are not based on product cost as in a market system. Countertrade is a serious danger because of the continued transfer of technology and the loss of production and jobs. Yet countertrade may represent 20 percent of world trade in the 1980s.

"Critical U.S. military technologies have been handed over to nations committed to support the Soviet Union as part of a massive pattern of transferring U.S. technology around the world.

"The AFL-CIO has long urged adequate monitoring of nonmarket trade and bilateral regulation."

Artificial pricing is indigenous to NME's because their prices are government controlled, and their economies are government planned—heavily subsidized—and, therefore, not reflective of an interplay between supply and demand. Production costs are not susceptible to real measurement. Their sales are not based on traditional market factors such as costs and profits. Their aim is to push exports as a source of foreign exchange or to barter to aid in internal industrial development or other governmental policies. For these reasons, a "free trade" country ends up playing Russian Roulette when trying to make the price comparisons necessary to establish dumping. The most famous example of this problem, of course, is the Polish golf cart case, in which the Poles, who have no golf courses in their country, were selling golf carts in the United States at exceptionally low prices and disrupting the American market for golf carts. Since there was no internal market for golf carts in Poland, it was impossible to apply the normal test for dumping—selling below prices charged in the home country—or below cost of production.

Given the history of trade disruption caused by nonmarket economy countries, the first issue that must be addressed is whether the present law definition of NME's is adequate. We suggest that it is clearly not adequate and recommend that additional language be added to present law so as to include coverage of sales by government controlled and planned economies along with communist countries now covered by definition. In this regard, we do not think it is necessary to scrap the current definition of an NME, as proposed by S. 1351, and start from scratch but rather we prefer to build on the current definition to reflect the fact that nonmarket economies are not only communist countries but also include government planned, heavily subsidized economies.

Current law is totally inadequate for taking care of these problems. Both the General Agreement on Tariffs and Trade (GATT) and U.S. law are geared to "free market" economies. In 1978, Treasury Department regulations sought to cope with these problems through the use of concepts of "comparable economy" or "constructed value" (which could include hypothetical costs). At the time, the AFL-CIO urged that those regulations be withdrawn. In a letter of opposition to the Commissioner of Customs (see attached letter dated February 22, 1978), AFL-CIO Research Director, Rudy Oswald stated in part:

"Dumping is not a theoretical problem for American workers. It is a hard, unassailable, job destroying fact. Imports of glass, shoes, golf carts, bicycles, have been dumped at the expense of United States workers. Now more sophisticated equipment, such as aircraft engines, computer parts, etc., are coming in from communist countries and costing United States jobs. Any regulation to reduce the penalties for illegal dumping of these products is against the best interests of the United States and mockery of United States' law."

S. 1351 would permit an interested party—as defined in current law—to file a complaint alleging artificial pricing against an NME. If the respondent country provides "verifiable information" sufficient to permit a normal countervailing duty or anti-dumping investigation, then the investigation will be conducted without regard to whether an industry is injured or to whether the establishment of an industry is materially retarded. In other words, the current concept of Section 406 of the '74 Trade Act would cease to exist, and instead would be redesigned to deal with unfair trade practices rather than market disruption. The purpose for dangling this carrot in front of an NME is that in the long term it might encourage it to "develop the attributes of market economies." The other side of the coin—the stick—is that if "verifiable information" is not supplied sufficient to conduct such as investigation, then an artificial pricing investigation will commence.

Assuming an artificial pricing investigation, it will be defined to exist "Whenever an article like an article produced by such domestic industry, is imported directly or indirectly from an NME country or countries at a "price below the lowest free market price of like articles."

The AFL-CIO opposes this approach. How can there be an objective determination of "verifiable information" obtained from a state-controlled economy under consideration in an adversary proceeding? It would be preferable to retain and effectively enforce market disruption, the concept embodied in Section 406. We make this recommendation because it is the sale by the nonmarket country—not the country standing alone—that adversely affects U.S. producers and workers.

Moreover, the proposed definition of "artificial pricing" fails to take into account the fact that the United States is disadvantaged uniquely in East-West relations. European countries have bilateral quotas to prevent market disruption—while the U.S. has remained open to nonmarket countries. The only realistic "free market" measure for a nonmarket import is the average U.S. price for that product. Anything else would encourage imports from nonmarket economies—to the detriment of U.S. production.

For example "artificial pricing" should not be determined on that basis that the Taiwanese sell a like article at a price equal to or slightly below that of a nonmarket economy. We suggest that the preferable course of action is to follow the lead of European countries by preventing market disruption rather than attempting simply to paper over the problem after it has occurred. At the very least, the average U.S. price would be a fairer and more accurate measure.

S. 1351 is serving the purpose of raising general awareness that there is need to find solutions to these complex problems. We cannot afford to leave unattended market disruptions resulting from unbridled trade with nonmarket countries.

Attachment.

FEBRUARY 22, 1978.

Mr. ROBERT E. CHASEN,
Commissioner of Customs, U.S. Customs Service,
Washington, DC.

DEAR MR. CHASEN: The AFL-CIO opposes Treasury's proposed changes in the regulations for enforcement of the Antidumping Act against imports of products from Communist countries. These changes, published in the Federal Register on January 9, 1978, would allow Treasury to set lower charges against imports dumped by communist countries in the United States than those now required by law. The AFL-CIO recommends that this unfair proposed change be withdrawn.

Dumping means selling a product in the United States at less than fair value or less than the market price in the exporting country's market. When a United States industry is hurt by dumping of imports, the law directs Treasury to put on a tariff to offset the unfair and illegal dumping price. Dumping is an illegal practice under the United States Antidumping Act of 1921, as amended, and international agreements.

Communist countries have no equivalent of "fair market value" in a market pricing system, because their prices are set by government regulation. To determine dumping values, therefore, the Treasury established a practice of using prices charged for a similar product in a non-communist country where market prices exist. In Section 321(d) of the Trade Act of 1974, Congress made this practice part of the United States antidumping law. In 1976, Customs amended the regulation, 19 CFR Part 153.7, to conform with that law.

Now Treasury seeks to modify that ruling and allow Treasury officials to construct the appropriate value abroad in one of three ways:

First, actual sales price in a country with "comparable" economic development to the communist country.

AFL–CIO opposes this because no realistic comparisons of economic development levels between market and non-market economies can be objectively established. Furthermore, a product can be dumped in the United States from an underdeveloped country. The level of economic development does not determine whether or not an unfair or illegal price is established.

Second, if no "comparable country" exists which produces the product, Treasury could set up a "constructed value" based on costs of the product in a non-state controlled country. But that value could be "adjusted for differences in economic factors" to meet the "comparable" country standard.

The AFL–CIO opposes this because it would call for non-objective determinations by Treasury. The price in a dumping case is a market price of a product—not a constructed or theoretical price.

Third, if no "comparable country exists", Treasury can set up hypothetical costs for "constructed value" which then can be adjusted for differences on the basis of "specific objective components" or factors of production. "Such specific components or factors of production, including, but not limited to, hours of labor required, quantities of raw materials employed, and amount of energy consumed, will be obtained from the state controlled economy under consideration." Then the Secretary of the Treasury would be empowered to determine whether or not "verification" of these figures in the "state-controlled economy" meet his "satisfaction", and, if so, these would be "valued in a non-state-controlled economy determined to be comparable in economic development. . . ." (153.7(b)(2)

The AFL–CIO opposes this because it is non-objective and because it would set up an ever-larger bureaucracy to determine hypothetical information. Again, dumping is sale in a market economy and must relate to real market prices.

Dumping is not a theoretical problem for American workers. It is a hard, unassailable, job destroying fact. Imports of glass, shoes, golf carts, bicycles, have been dumped at the expense of United States workers. Now more sophisticated equipment such as aircraft engines, computer parts, etc., are coming in from communist countries and costing United States jobs. Any regulation to reduce the penalties for illegal dumping of these products is against the best interests of the United States and a mockery of United States' law.

The Treasury Department has not justified any change in the current regulation 153.7 and 153.27 which now conform with United States law. The AFL–CIO urges withdrawal of the proposed changes.

Sincerely,

Rudy Oswald,
Director, Department of Research.

Chamber of Commerce of the United States of America,
Washington, DC, May 8, 1984.

Hon. John C. Danforth,
Chairman, Subcommittee on International Trade, Committee on Finance,
U.S. Senate, Washington, DC.

Dear Mr. Chairman: I am writing to comment on S. 1351, a bill "to provide a special remedy for the artificial pricing of imports produced by nonmarket economy countries." There is clearly a need to reform U.S. laws governing the treatment of imports from these countries. The current approach of using a surrogate country to construct a fair market value in order to determine dumping has created tremendous confusion on the part of domestic industry and foreign exporters alike. The ineffectiveness of Section 406 of the Trade Act of 1974 on market disruption also points to the need for change in present import administration law.

While we are continuing to formulate a position on S. 1351, I would like to share with you our preliminary thoughts and planned activities relating to the subject of your hearing.

S. 1351 represents a serious attempt to do away with the cumbersome and largely unworkable surrogate country approach to determining dumping from nonmarket economy countries (NMEs). The legislation establishes a "minimum allowable import price," which is defined as the lowest average price to U.S. customers from the "most suitable" market economy producer, including U.S. producers. As such, the legislation assumes that there will always be a market economy producer that is more efficient than an NME producer. Moreover, it raises definitional questions as to what constitutes the "most suitable" producer. These problems are particularly acute in cases where the U.S. and NME producers are the only significant producers of the goods in question.

S. 1351 appears to recognize that there are industries in the nonmarket world which are increasingly guided by the forces of the international marketplace. Where there is sufficient verifiable cost information, these industries would be treated as market economies for purposes of antidumping duty or countervailing duty investigations. There is merit to treating certain industries in an NME country as market-oriented for purposes of dumping and coauntervailing duty deliberations.

On the other hand, greater attention needs to be given to the definition of a nonmarket economy country or industry. S. 1351 provides virtually no guidance. At present, the determination is left to the discretion of the administering agency. While we recognize the need for flexibility in this regard, the law should be more precise in the criteria which must be reviewed before the classification of an industry/country as a nonmarket economy.

Another area that requires more consideration is the bill's injury test. For a nonmarket economy country or industry where cost and price calculations are unreliable, the issue of injury to domestic industry is key to effective import administration. The "artificial pricing" investigation proposed in S. 1351 requires the petitioner to prove injury to the domestic industry only if the NME producer is a GATT member. On the other hand, U.S. countervailing duty law does not require an injury finding unless the exporting country has signed the GATT Subsidies Code specifically. Paradoxically, this might lead a market-oriented industry in a nonmarket economy country to conclude that it was best not to furnish the verifiable cost information needed for a normal countervailing duty investigation—clearly the opposite intent of S. 1351.

Because of these unresolved problems and the long-term impact of a new law on U.S. import administration and trade, we ask that the International Trade Subcommittee give S. 1351 a great deal of study before proceeding with its markup. In that connection, I would note that the Chamber is planning a conference this summer to take a careful look at U.S. law regulating nonmarket economy imports. It is our intention to invite experts from the private sector and government, including staff members from your Subcommittee and the Trade Subcommittee of the House Ways and Means Committee. Out of these deliberations, we hope, will come recommendations for a sound NME import administration law.

I would appreciate your consideration of our views and inclusion of this letter in the hearings record.

Sincerely,

RICHARD L. BREAULT.

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